82-915

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CLYDE R. DONNELL, HERBERT BOLER, THOMAS F. AKERS, PAUL A. PRIDE, JAMES R. ANDREWS, Members of the Board of Supervisors of the County of Warren, Mississippi, Acting for and on behalf of the County of Warren,

Petitioners

v.

UNITED STATES OF AMERICA

and

EDDIE THOMAS, SR., CHARLIE STEELE, FRANK H. SUMMERS, ST. CLAIR MITCHELL, MRS. CHARLIE HUNT, TOMMIE LEE WILLIAMS, SR., WILLIE JORDAN,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. When intervention occurs, what is the proper test to be employed for determining "prevailing party" status when the intervenor subsequently seeks a fee award?

2. Did the court below correctly define the "special circumstances" exception to an award of fees in proceedings brought pursuant to section 5 of the Voting Rights Act when the applications for fees demonstrated (a) massive duplication between counsel representing intervenors; and (b) no division of effort by those applying for fees and four attorneys representing the Department of Justice?

3. Did the court below commit error in determining that in all cases brought in the District of Columbia the hourly rate to which counsel for prevailing parties will be entitled is the hourly average for attorneys practicing in the District?

4. Did the court below commit error in concluding that it was proper to base an award of fees on the average hourly rate of members of the private bar when a prevailing party is represented by an attorney employed by a not-for-profit organization?

5. Did the court below err in not properly defining the scope of procedural responsibilities of a district court judge when an application for attorneys' fees is contested?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on June 25, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 682 F.2d 240 and appears at Appendix A. The opinions of the District Court for the District of Columbia are unreported and appear at Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1982. Petitions for Rehearing and Rehearing en banc were denied on July 22, 1982. On October 1, 1982, the Chief Justice entered an order extending the time for filing the petition to and including December 4, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 42, section 1973*l*(e) provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On March 6, 1978, petitioners, members of the Board of Supervisors of Warren County, Mississippi, invoked the jurisdiction of a three-judge court in the District of Columbia seeking a declaratory judgment pursuant to section 5 of the Voting Rights Act.[1] The county was represented by its attorney, a professor from the University of Mississippi Law Center and counsel in the District of Columbia retained to comply with the district court's local rule. Each was to be compensated at a rate of fifty dollars per hour. The United States, as named defendant, was represented by four attorneys from the Voting Rights Section of the Department of Justice. Respondents-intervenors (minority voters of the county) were represented by Mr. Frank Parker, a Jackson, Mississippi, attorney practicing in the Jackson office of the Law-

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[1] 42 U.S.C. § 1973c (1976). The purpose of the suit was a declaration that a proposed redistricting plan did not have the purpose or the effect of denying or abridging the right to vote on account of race.

yers' Committee For Civil Rights Under Law, Mr. James Winfield, a private practitioner of Vicksburg, Mississippi, and, for purposes of complying with the district court's rule, Mr. Richard Kohn, an attorney in the Washington office of the Lawyers' Committee.

Proceedings in the case may be divided into four segments: a discovery period of approximately one year and a half; preparation of pretrial briefs and drafting proposed findings of fact and conclusions of law; a one-hour appearance in the district court for oral argument before the three-judge panel; and finally, after the district court's denial of declaratory relief, preparation of a Jurisdictional Statement and Motions to Affirm.

After this Court's refusal to review the judgment of the three-judge court, 444 U.S. 1059 (1980), respondents filed for an award of fees in excess of $89,000. Mr. Parker requested $100 per hour for 381 hours and Mr. Kohn claimed 47 hours of work on the case at the same rate. Respondents submitted affidavits in support attesting that this rate fairly reflected the average charged by attorneys practicing with major firms in the District. Mr. Winfield requested $75 per hour for 182 hours he claimed to have expended on the case. In support of his claim he filed an affidavit stating that "for a case of this magnitude and significance, my [Mr. Winfield's] hourly rate is $75 per hour." Ms. Barbara Phillips, a staff attorney in the Jackson, Mississippi office of the Lawyers' Committee, requested $75 per hour for 30 hours expended by her in preparing the motion and affidavit in support of an award of fees. This rate was presumably intended to reflect the average rate for attorneys in the District with her experience. Respondents also contended that the total allegedly due should be increased by a multiplier of 1.5 to reward each attorney for the quality of representation supplied throughout the case.

When attempts to negotiate a settlement failed, petitioners requested an evidentiary hearing. In addition to

arguing that the average hourly rate charged by similarly-situated members of the Mississippi bar ($50 per hour) was the correct figure to be employed if an award were deemed proper, petitioners' memorandum in support of a hearing raised the following issues:

(1) Affidavits filed by Messrs. Parker, Kohn and Winfield were not sufficiently particularized inasmuch as none attempted to catalog the activities undertaken (attending depositions; drafting interrogatories, writing briefs, etc.) in a form which clearly demonstrated that the activity in question was necessary to protect their clients' interest and not merely duplicative of activities engaged in during the same time period by one or more of the four attorneys representing the Department of Justice.

(2) The affidavits were replete with duplicative entries. For instance, fifty-three of seventy-four entries by Messrs. Parker and Windfield were for identical work, *e.g.*, reviewing the same motion, attending the same deposition, reading the same brief, noticing the same deposition. Moreover, although Mr. Winfield and Mr. Parker were in separate offices (forty miles apart), thirty-six of the duplicative entries attested to an *identical* number of hours for performing the *same* function.[2]

(3) Mr. Winfield's affidavit listed his presence at over ten depositions which petitioners contended he did not attend. In response, petitioners filed not only cover sheets from the depositions in question to show that in each case the court reporter had not noted his presence but also affidavits of some deponents (including the local president of the NAACP) to the effect that Mr. Winfield had not been present.

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[2] See Appendix C, pp. 34a-39a, for a chart listing the billings of these two attorneys. Entries which are italicized are those which are identical as to time.

Without holding the requested hearing, District Judge June Green awarded over $73,000 in fees. To reach this figure, she determined that the average hourly rate should be that prevailing in Mississippi. In the court's view, this translated into $85 per hour for Messrs. Parker and Kohn and $60 per hour for Ms. Phillips and Mr. Winfield. The court then multiplied the base figure for the fee award by the requested enhancement factor of 1.5.[3] Because the case was "complicated" the duplication of hours did "not concern the Court," *albeit* 9.2 hours were reduced from Mr. Winfield's time to reflect nonappearance at two of the more than ten depositions which petitioners alleged he failed to attend.

In reversing, the Court of Appeals wrote a wide-ranging opinion which (1) set standards for determining when an intervenor in a section 5 case may lay claim to "prevailing party" status; (2) determined that in the instant case and in all future section 5 cases the "average hourly rate" for those attorneys representing intervenors is that prevailing in the District of Columbia; (3) concluded that although serious questions were raised whether intervenors' "participation needed to be so extensive given the central role played by four attorneys from the Department of Justice," an evidentiary hearing should be limited to Mr. Winfield's application, *i.e.*, although duplication had been alleged, no "reasonable basis [exists] for believing [that Mr. Parker's or Mr. Kohn's] filing is excessive;" and (4) concluded that the district court utilized inappropriate criteria to determine that a 1.5 multiplier was warranted.

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[3] The final total was reached by an analysis contained in a Memorandum Opinion which was amended by a subsequent order of the Court. See Appendix B.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

When Congress amended the Voting Rights Act to provide for an award of fees to a "prevailing party" in actions brought to enforce "voting guarantees of the fourteenth and fifteenth amendment," [4] it incorporated therein legislative purposes underlying a significant portion of modern day fee-shifting statutes, including those currently employed when construing 42 U.S.C. § 1988 (1976).[5] One of these is the congressional determination that pursuant to this Court's decision in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), successful parties "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." [6]

The issues raised by this case are only some of those which continue to plague the lower courts in their ongoing attempts to develop a realistic, workable method of effectuating this legislative purpose without subjugating the equitable interests of the parties to whom the fee is shifted. When may a litigant lay claim to "prevailing party" status? What is a "reasonable fee" and how should it be computed? What is the scope of the "special circumstances" exception, and, finally, what procedures are required of the district court when a fee request is contested? Thus, although this case arises in the specific context of section 5 of the Voting Rights Act, it also provides an appropriate vehicle for establishing definitive guidelines applicable not only to 42 U.S.C. § 1988 but also to many of the more than 120 separate pieces of legislation incorporating the fee-shifting approach.[7] *Cf. Hensley v. Eckerhart*, No. 81-1244.

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[4] 42 U.S.C. § 1973*l*(e).

[5] See, *e.g.*, Riddell v. National Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980).

[6] S. REP. No. 295, 94th Cong., 1st Sess. 40 (1975).

[7] See E. R. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 323 (1981).

II. THERE IS A CONFLICT BETWEEN THE CIRCUITS AND WITHIN THE DISTRICT OF COLUMBIA CIRCUIT ITSELF ON STANDARDS TO BE APPLIED FOR THE PURPOSE OF DETERMINING PREVAILING PARTY STATUS VIS-A-VIS INTERVENORS

The present conflict in circuits with respect to the correct test to be applied for purposes of defining a prevailing party is well known. *Kenley v. Young*, 102 S.Ct. 1476 (1982) (Justices Rehnquist and O'Connor dissenting from denial of certiorari). See also *Johnston v. Jago*, No. 81-3433 (6th Cir., Oct. 22, 1982) (noting the continuing conflict on the issue). In cases involving intervention, where the intervenor subsequently lays claim to prevailing party status for purposes of a fee award, proper resolution of the issue is equally in dispute.

The Fifth Circuit, in *E.E.O.C. v. Strasburger, Price, Kelton, Martin & Unis*, 626 F.2d 1272 (5th Cir. 1980), held that when "benefits resulting" to intervenors are "primarily brought about" by a government entity's participation in a suit, an award is improper. *Id.* at 1274. Subsequently, and without reference to *Strasburger*, the court held that although intervenors "played a role" in litigating the case, denial of fees was appropriate where the "sole success" in the case resulted from the efforts of another party. *Lipscomb v. Wise*, 643 F.2d 319, 322 (5th Cir. 1981).

A more liberal approach has been taken by the Ninth Circuit. In *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd on other grounds*, 102 S. Ct. 3187 (1982), it was argued that intervenors should not be awarded fees as prevailing parties because "they played a *de minimis* role in the trial on the merits." [8] The court rejected this analysis, holding it was sufficient that the intervenors had responsibility for an important

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[8] 633 F.2d at 1349.

but unlitigated issue. Because it perceived a congressional purpose in the enactment of 42 U.S.C. § 1988 of "encouraging constitutional litigation," the court held that

> to . . . deny attorney's fees because an issue is not considered or because a party's participation proves unnecessary would have the effect of discouraging the intervention of what in future cases may be essential parties.[9]

Congress, of course, failed to incoporate section 5 proceedings within the literal language of 42 U.S.C. § 1973*l* (e) and the former hardly fits the definition of "proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." Moreover, the only suggestion that fees may be available to private intervenors in such proceedings is found in a minor footnote in the Senate Report.[10] Lacking guidance as to when, and under what circumstances those laying claim to the status of private attorneys general may claim fees for their efforts in cases where Congress has specifically mandated that the real Attorney General have sole responsibility to protect rights granted, the court below rejected the Ninth Circuit approach and established criteria somewhat less demanding than that found in the Fifth. At one end of the spectrum are those situations where intervenors contrib-

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[9] *Id.*

[10] In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiff and/or plaintiff intervenors. However, in the procedural posture of some cases (e.g. a declaratory judgment under Sec. 5 of the Voting Rights Act), the parties seeking to enforce such rights may be the defendant and/or defendant intervenors.

S. Rep. No. 295, 94th Cong., 1st Sess. 40 n.42 (1974).

There is a significant question as to whether such a minor reference in a legislative history is to be given controlling weight. Cf., Chrysler Corp. v. Brown, 411 U.S. 281, 311 (1979); SEC v. Sloan, 436 U.S. 103, 121 (1978).

ute "little or nothing of substance" [11] or do not add "in any essential way" [12] or whose arguments are "mostly redundant . . . or . . . otherwise unhelpful." [13] At the other are those whose participation results in a "unique contribution" [14] or who "contribute . . . substantially to the success of the litigation." [15]

After the lower court handed down its decision, another panel within the same circuit issued its opinion in *Commissioners Court of Medina County v. United States*, 683 F.2d 435 (D.C. Cir. 1982). Without reference to the instant case, it initially determined that "active participation" [16] by intervenors in section 5 proceedings was sufficient for these parties to lay claim to prevailing-party status. Turning to the "special circumstances" exception, it then proceeded to list considerations which may warrant a total denial of fees, including determinations of whether the "net result" was so far removed from the position of intervenors that "the victory can fairly be said to be a pyrrhic one;" [17] whether the result obtained was "only the position" taken by the United States; [18] whether participation by intervenors was "necessary to protect their interests or further . . . the public policy embodied in the Voting Rights Act;" [19] whether the inter-

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[11] Appendix A at 10a.

[12] *Id.* at 12a.

[13] *Id.* at 13a.

[14] *Id.* at 12a.

[15] *Id.* at 12a.

[16] 683 F.2d at 443. Although the case arose from a fee request where the case was settled prior to final judgment, the court stated that its reasoning was intended to be placed "on the same par" as cases decided on the merits. *Id.* at 442.

[17] *Id.* at 443.

[18] *Id.*

[19] *Id.*

venors had an "independent impact" on the outcome;[20] or whether they have affirmatively demonstrated that participation "was not a mere duplication of efforts expended by the United States."[21] The net result of *Medina County* is another set of unique standards, many of which conflict with those enunciated by the lower court in the instant case.

The lower court opinion is in conflict with decisions of the Fifth and Ninth Circuits as well as an opinion in its own circuit. Certiorari should be granted to determine under what circumstances intervenors are entitled to an award of fees as prevailing parties.

III. THERE IS A CONFLICT IN CIRCUITS AND WITHIN THE DISTRICT OF COLUMBIA CIRCUIT AS TO THE PROPER APPLICATION OF THE "SPECIAL CIRCUMSTANCES" EXCEPTION

In one portion of its opinion, the lower court responded to petitioners' arguments that hours claimed by counsel for intervenors were overwhelmingly duplicative, not only as between themselves, but also of efforts by the four attorneys from the Department of Justice, by noting that if the hours were "mostly redundant" an award of fees would be inappropriate.[22] In another section, however, it held that if intervention in the instant case was of such a caliber to warrant an award of fees, *e.g.*, if the trial court should determine that intervenors "contributed substantially," all hours requested by counsel should be compensable.[23]

In contrast, the *Medina County* panel admonished that for all hours to be compensable, the *record* must show

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[20] *Id.*

[21] *Id.*

[22] App. A at 13a.

[23] *Id.* at 14a.

that "participation . . . [is] not a mere duplication of the efforts expended by the United States." [24] This analysis coincides with that of the First Circuit which, after noting that the submitted records of fee applicants did "not indicate how responsibility for issues" was divided by participating counsel, admonished that a

> convincing description of the division of labor must accompany reports of contemporaneous or identical work performed by several attorneys if deductions for duplication are to be avoided.

Furtado v. Bishop, 635 F.2d 915, 922 (1st Cir. 1980).[25]

The First Circuit approach is, in turn, a rephrasing of the directive contained in the case which is conceded to be one of the major lower-court decisions in the country on standards to be used in awarding fees:

> The trial judge is necessarily called upon to question the time, expertise and professional work of a lawyer . . . . But that is the task, and it must be kept in mind that the plaintiff has the burden of proving his entitlement to an award for attorney's fees just as he would bear the burden of proving a claim for any other money judgment.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974).

Attached as Appendix C is a chart listing entries by Messrs. Parker and Winfield in support of an award of fees. For purposes of evaluation, entries by each attorney for work done on identical days and for identical tasks and the time spent for each are placed side by side. In contrast to that required by the First Circuit and the *Medina County* decision, there is no description at all, much less a "convincing description," of any division

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[24] 683 F.2d at 443.

[25] See also King v. Greenblatt, 560 F.2d 1024, 1027 (1st Cir. 1977) (requiring "full and specific accounting").

of labor either between themselves or the four attorneys with the Department of Justice who were contemporaneously performing the same tasks, *e.g.*, attending depositions, filing motions and the like. By refusing to require that intervenors affirmatively demonstrate that "their participation . . . was not a mere duplication of the efforts expended by the United States," [26] and by not requiring a "convincing description" of such an arrangement in their submission, the lower court decision is in conflict with the First Circuit as well as another decision within the District of Columbia Circuit itself. The issue of duplication and its effect on a proper determination of the "special circumstances" exception warrants a grant of certiorari in the instant case.

IV. THERE IS A CONFLICT IN CIRCUITS AS TO A PROPER DETERMINATION OF THE "PREVAILING HOURLY RATE" WHEN A COURT DETERMINES THAT AN AWARD OF FEES IS PROPER

In *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. (1982), *pet'n for cert. pending*, No. 81-2135, the court held that when a requested fee is significantly higher than that prevailing in the community where the district court sits, the rate where "an attorney normally practices" [27] will be used unless services of "like quality" are available in the "locality where the cause is heard." [28] Subsequently, the Eighth Circuit reviewed a case from Arkansas in which an attorney requested an hourly rate reflective

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[26] The District of Columbia Circuit has also held that "hours not properly billed to one's client are also not properly billed to one's adversary." Copeland v. Marshall, 641 F.2d 880, 903 (D.C. Cir. 1980)(en banc). The issue which has been raised throughout, of course, is whether counsel for intervenors were representing a private fee-paying client, a decision to bill for work also accomplished by the Department of Justice would have been proper.

[27] 670 F.2d at 769.

[28] *Id.* at 768.

of that prevailing in California, where he normally practiced. Agreeing that "out-of-town counsel [are not] always . . . limited to *lower rates* [where the case is tried]," [29] the court nevertheless concluded:

> our knowledge of the bar leaves us no doubt that plaintiff could have found adequate counsel closer to the situs of the case for substantially less than $170 an hour.[30]

These decisions reflect an equitable approach to an award of attorneys fees: the party to whom a fee is shifted should not be liable for fees *higher* than that charged in the community where the case is tried unless it is clear that it was necessary for the prevailing party to go outside that community in order to secure specialized legal talent necessary to win the case.

The approach taken by the lower court is diametrically opposed to that of the Seventh and Eighth Circuits. Although the Court recognized the *Chrapliwy* precedent (and presumably its equitable approach to awards),[31] it proceeded to hold that the "prevailing market rate" of the District of Columbia would be applied in the instant case and all future cases (of whatever origin) because it "is a simple rule to follow." [32] In so doing, it accomplished several things. First, it disregarded one of the few major congressional directives with respect to an appropriate award, *i.e.*, an amount sufficient to "attract

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[29] Avalon Cinema Corp. v. Thompson, 689 F.2d 137, 140 (8th Cir. 1982) (Emphasis added).

[30] *Id.* at 141.

[31] This is not to say that the lower court did not also take the opportunity to mangle its holding. Mr. Winfield became the beneficiary of the *low* Mississippi rate because his services were deemed "particularly . . . necessary," App. A at 20a, a finding, of course, employed by the Seventh and Eighth Circuits for justifying a *higher* hourly rate.

[32] App. A at 18a.

competent counsel . . . while avoiding windfalls to attorneys." [33] Clearly an award geared to the rates of a covered jurisdiction filing under section 5 is sufficient to attract "competent counsel" to represent intervenors. Moreover, in cases arising from the more than 7,000 jurisdictions now covered by section 5 whose economic conditions lag far behind those found in the District of Columbia, the approach taken by the lower court can only result in a "windfall" to attorneys practicing in these areas who successfully represent intervenors. Finally, and most important, the approach taken by the lower court places it in direct conflict with that of the Seventh and Eighth Circuits which only authorize higher rates in exceptional circumstances. As such, the issue warrants a grant of certiorari.

V. THE HOURLY RATE WHICH MAY BE DEMANDED BY COUNSEL FOR PREVAILING PARTIES WHO ARE MEMBERS OF THE PUBLIC INTEREST BAR PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This Court has clearly held that representation by a public interest group is not a "special circumstance" that should result in a denial of fees. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 n.9 (1980). The issue which has not been directly addressed, however, is whether the "prevailing rate" which they may demand for their time is to be directly equatable with attorneys in private practice. Although the Circuits are now uniform in their holdings that the answer is "yes," this uniformity has not been achieved without misgivings. Although the following view apparently has been modified,[34] as recently as

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[33] See, e.g., H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 9 (1976).

[34] See Watkins v. Mobile Housing Bd., 632 F.2d 565 (5th Cir. 1980); Davis v. City of Abbeville, 633 F.2d 1161, 1164 (5th Cir. 1981).

1980 the Fifth Circuit approved a lower rate for a law professor, noting:

> [S]ome portion of a fee award may be allocable to reimbursing counsel for overhead expenses . . . Indeed in some instances district judges [may] require that testimony bearing on requests for attorneys fees include information on overhead expenses incurred.[35]

In addition, before reversal by an *en banc* court, one panel of the District of Columbia Circuit took this position:

> The attorney [involved in public interest litigation] should be paid an adequate fee for his work and that is all . . . . Those lawyers who choose the commendable course of serving the public interest rather than building a remunerative commercial practice cannot expect the same financial rewards as such practitioners sometime achieve. The law is not a money-grubbing profession; windfalls should not be given to those who successfully represent persons not properly treated by our Government . . . . It would be a gross mistake to make the highest level of charges in the private sector a measure of compensation to be paid all attorneys who seek to vindicate an identifiable public interest.[36]

If intervenors had been represented only by a member of the private bar, their fee request would have been guided by specific, tightly-drawn evidentiary requirements of the District of Columbia Circuit to justify the rate requested. In particular, an applicant must "submit specific evidence of his or her actual billing practice during the relevant time period" and

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[35] E.E.O.C. v. Strasburger, Price, Kelton, Martin, & Unis, 626 F.2d 1272, 1276 (5th Cir. 1980).

[36] Copeland v. Marshall, 594 F.2d 244, 257 (D.C. Cir. 1978), *as clarified*, 20 FEP Cases 79, *reversed*, 641 F.2d 880 (D.C. Cir. 1980) (en banc).

> [t]his rate is not what he would have liked to receive, or what the client paid in a single fortunate case, but what an average counsel has in fact received. It is obvious that where counsel customarily exercises billing judgment by not billing at the market rate or the full amount of time expended, this fact must be considered in calculating counsel's true billing rate.[37]

In contrast, a request for fees by a member of the public interest bar need only incorporate affidavits that recite "the precise fees that attorneys with similar qualifications have received from fee paying clients in comparable cases . . . ." [38] The result, as in the instant case, is that public interest attorneys merely file affidavits from partners in prestigious firms in the District,[39] which, in turn and by operation of law, transfers the economics of these institutions (including a massive overhead and a commensurate ability to attract clients capable of paying fees from $125 to $150 per hour) to the person or entity now liable under the fee-shifting mechanism.

At this point, petitioners have no interest in exploring the policy reasons behind the current uniformity in circuits which serve to justify such a result. Rather, the important issue is whether the approach taken is one which conforms with a legislative history which *clearly* directs the courts to award fees in such a manner.[40] This is a federal question that demands ultimate resolution by this Court.

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[37] National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1326 (D.C. Cir. 1982).

[38] *Id.* at 1325.

[39] Intervenors filed affidavits from partners in Shea & Gardner; Arent, Fox, Kitner, Plotkin & Kahn; and Williams & Connolly.

[40] *E.g.*, Copeland v. Marshall, 614 F.2d 880, 899 (D.C. Cir. 1980) (en banc) (citing House and Senate reports which, in turn, cite cases in which lower courts applied rates of the private bar to a public interest law firm).

VI. THE ISSUE OF THE EXACT SCOPE OF RESPONSIBILITY OF A DISTRICT COURT JUDGE WHEN A FEE REQUEST IS OPPOSED PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

At the time that petitioners requested an evidentiary hearing and filed a motion in support thereof, there was only one district court decision in the circuit on the issue. It held that a "complete and particularized evidentiary foundation, developed, if necessary, at an evidentiary hearing," must support an award of fees.[41] Subsequently, the circuit altered this approach in *Copeland v. Marshall*, 641 F.2d 880, 905 (D.C. Cir. 1980) (en banc), when it rejected the government's argument that it was error for the trial judge not to hold a hearing on the issue of fees:

> Such a hearing may sometimes be useful. In this case, however, the District Court ruled on the fee question after witnessing the conduct of the entire case, and with the benefit of substantial briefs from both sides. We cannot say that failure to hold a hearing under these circumstances was error. Moreover, the government never took the elementary step of asking the District Court to hold a hearing.

In the instant case, and in sharp contrast with the facts in *Copeland*: (1) a majority of the hours claimed by those requesting fees has been spent performing tasks not subject to the trial judge's professional evaluation, *e.g.*, discovery and preparing briefs for review by this Court; (2) petitioners had requested an evidentiary hearing; and (3) petitioners' memorandum in support thereof not only demonstrated specific factual issues which were hotly disputed but also decried the inadequacies of the filings on their face since they made no attempt to deal with duplication between intervenors' counsel and those representing the Department of Justice. In reversing and

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[41] Bachman v. Pertschuk, 19 EPD ¶ 9044, at 6503 (D.D.C. 1979).

requiring a hearing only as to hours submitted by Mr. Winfield, the lower court held as follows:

> Appellants [petitioners] similarly have failed to specify their challenges to Parker's claimed hours. We emphasize that the party challenging an application for fees should frame its objections with specificity. The district court cannot inquire into the reasonableness of every action taken and every hour spent by counsel, and it will consider objections to filed hours only where it has been presented with a reasonable basis for believing the filing is excessive.

App. A at 15a.

Petitioners' memorandum in support of an evidentiary hearing did, however, clearly contest "with specificity" the number of hours filed.[42] Thus, what has occurred below and what is occurring in district courts throughout the country is that in a proceeding which this Court has now found to be "uniquely separable from the cause of action proved at trial," *White v. New Hampshire*, 102 S. Ct. 1162, 1166 (1982), the lower courts are employing an *ad hoc* approach to procedural responsibilities of the litigants and district courts when fee requests are opposed. Moreover, although this Court has concluded with respect to fee requests under the Clayton Act that "as a general rule" they should only be decided "after hearing evidence," *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970), there are no clear, definitive guidelines as to when hearings should be held,[43] whether discovery is fully

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[42] On the matter of hours, petitioners dispute the totals submitted by Messrs. Parker and Winfield. The number of identical entries (an issue over and above that of duplicative work) calls for an intensive examination by this Court which can only be implemented by requiring "cogent and reliable documentation" . . . .

Id. at 144.

[43] One district court has characterized such proceedings as "an informational aid to the court," rather than "an adversarial

available [44] or, most importantly, what the responsibilities of the trial judge are in granting or denying fees. See *Consolidated Freightways Corp. v. Kassel*, 102 S. Ct. 1496 (1982).

The District of Columbia Circuit recently expressed its concern "that an unnecessary volume of attorney fee disputes are coming before the District Court" and being appealed.[45] Its efforts to establish some definitive guidelines, however, evoked the following response in a concurring opinion:

> Attorneys' fees applications are, of course, closely related to the merits . . . . At the same time, however, they are more akin to completely separate civil suits. It is the mixed nature of such proceedings, I believe, that give rise to much of the procedural floundering . . . .[46]

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process." Farris v. Cox, 508 F. Supp. 222, 227 n.16 (N.D. Cal. 1981). Some courts have held that if affidavits and briefs are complete, no hearing is required. See Manhart v. City of Los Angeles, 652 F.2d 904, 908 (9th Cir. 1981); Lipscomb v. Wise, 643 F.2d 219, 323 (5th Cir. 1981). Still other courts have held, pursuant to *Perkins*, that when a fee request is opposed, a hearing ordinarily will be held. Kargman v. Sullivan, 589 F.2d 63, 67 (1st Cir. 1978); City of Detroit v. Grinnell Corp., 495 F.2d 448, 473-74 (2d Cir. 1974). See also National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1330 (D.C. Cir. 1982) (hearing when there are "disputed issues of fact").

[44] Recently, the District of Columbia Circuit held:

> Discovery requests should be precisely framed and promptly advanced before final opposition papers are filed . . . [U]nfocused requests to initiate discovery without indicating its nature or extent serve no purpose. . . .

National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1329 (D.C. Cir. 1982).

The response in a concurring opinion was that the opinion "provided sorely needed guidance to applicants for attorneys' fees, opposing parties, and district judges alike." *Id.* at 1337 (Tamm, J., concurring).

[45] *Id.* at 1330.

[46] *Id.* at 1337 (Tamm, J., concurring).

The time is ripe for this Court to give authoritative guidance to the lower courts on the procedures to be employed when a fee request is contested as well as the responsibilities of district judges in such proceedings. These are important issues of federal law which have not been but should be decided by this Court.

VII. CONCLUSION

One commentator has concluded that the current process for determining an award of fees is comparable to a "court-directed game of roulette" which "has the same attractions for the adventuresome lawyer as those found in other games of chance." [47] The many issues raised in this petition now offer the Court the opportunity to give sorely-needed guidance to the lower courts with respect to their responsibilities when a fee-shifting request is made.

Respectfully submitted,

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[47] J. Dawson, *Lawyers & Involuntary Clients in Public Interest Litigation*, 88 HARV.L.REV. 849, 929-30 (1975).

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 81-1471, 81-1545

CLYDE R. DONNELL, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA

CLYDE R. DONNELL, *et al.*

v.

UNITED STATES OF AMERICA, EDDIE THOMAS, SR., *et al.*,
Appellants.

Argued 26 Feb. 1982

Decided 25, June 1982

Before TAMM and WILKEY, Circuit Judge, and GESELL,* United States District Judge for the District of Columbia.

Opinion for the Court filed by Circuit Judge WILKEY.

WILKEY, Circuit Judge:

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

This is an appeal from the district court's award of $73,669.88 in attorneys' fees to appellees, defendant-intervenors below in a suit under section 5 of the Voting Rights Act.[1] Appellants challenge the intervenors' entitlement to any fees at all, as well as the court's particular determinations in calculating the award. Appellees have cross-appealed, arguing that the district court erred in choosing the geographical market for determining the appropriate hourly rate. We find merit in both positions, and reverse and remand to the district court for further proceedings.

I. BACKGROUND

A. *The Merits Litigation*

In 1970 the Board of Supervisors of Warren County, Mississippi, adopted a redistricting plan which failed to receive approval of the United States Attorney General and ultimately was enjoined by the District Court for the Southern District of Mississippi because it diluted black voting strength.[2] In 1978 the Board adopted a new plan. Rather than seeking approval of the Attorney General, the Board brought an action against the United States in the District Court for the District of Columbia seeking a declaratory judgment that the new plan did not have a racially discriminatory purpose or effect. Seven black voters in Warren County intervened on the side of the United States.

After a year and a half of discovery, the district court ruled on 31 July 1979 that plaintiffs were not entitled to a declaratory judgment. The court held that the Board had failed to provide a legitimate nonracial justification for its plan, which would diminish black voting strength.

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[1] 42 U.S.C. § 1973c (1976).

[2] *See United States v. Board of Supervisors*, 429 U.S. 642, 97 S.Ct. 833, 51 L.Ed.2d 106 (1977).

On 19 February 1980 the Supreme Court summarily affirmed.[3]

Subsequently a new private action was filed in the District Court for the Southern District of Mississippi challenging the preexisting voting districts. Finding the districts unconstitutional, the district court imposed a plan proposed by the Department of Justice.[4] In elections held under this plan several black officials were elected.

B. *Award of Attorneys' Fees to Intervenor-Defendants*

On 1 May 1980 intervenors filed a motion for an award of $89,109.38 in attorneys' fees pursuant to Title 42, U.S.C. section 1973*l*(e), which authorizes the district court to award a reasonable fee to the prevailing party.[5] The request covered 381.05 hours worked by lead counsel Frank Parker, chief counsel for the Jackson, Mississippi, office of the Lawyers' Committee for Civil Rights Under Law; 191.35 hours worked by James Winfield, a practitioner in Vicksburg, Mississippi; 47 hours worked by Richard Kohn an attorney with the Lawyers' Committee's Washington, D.C., office; and 30 hours worked by Barbara Phillips, a Lawyers' Committee attorney who worked on the attorneys' fee application. Parker and Kohn requested an award at the rate of $100 per hour, Winfield at the rate of $77 per hour, and Phillips at the rate of $75 per hour; the requested rates for Parker and Kohn were based on the District of Columbia market, whereas the markets relied on by Winfield and Phillips were not specified. Multiplying rates by hours resulted in a lodestar of $59,406.25. In addition, intervenors requested an upward adjustment of the lodestar by a factor of fifty percent, which would produce a total of $89,109.38.

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[3] *Donnell v. United States*, Civ. No. 78-0392 (D.D.C. 31 July 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1059, 100 S.Ct. 1000, 62 L.Ed.2d 743 (1980).

[4] *Stokes v. Warren County Election Comm'n*, Civ. No. J79-0425(c) (S.D.Miss. 20 Sept. 1979).

[5] 42 U.S.C. § 1973*l*(e) (1976).

Appellants opposed the request on several grounds, and also requested an evidentiary hearing, which the district court denied. On 19 February 1981 intervenors were awarded $50,400 in attorneys' fees. The court found that the relevant geographical market was Mississippi rather than the District of Columbia, and awarded hourly rates it found prevailing in Mississippi: $60 an hour for Parker and Kohn, $50 an hour for Winfield, and $40 an hour for Phillips. The court allowed all hours claimed by all attorneys, except for 9.2 hours of deposition time claimed by Winfield but specifically contested in affidavits filed by appellants. The court then increased the lodestar figure by fifty percent, citing the contingent nature of the representation, the novel issues presented in the case, and the attorneys' unusually high quality of representation.

Intervenors subsequently sought reconsideration of the award based on recent decisions allowing hourly rates in Mississippi in excess of those allowed in the original decision. On 20 March 1981 the court amended its award by increasing the hourly rate for Parker and Kohn to $85 per hour and for Winfield and Phillips to $60 per hour. The court's ruling on the number of hours expended and on the number of hours expended and on the adjustment to lodestar remained the same, resulting in a total award of $73,699.88.

This appeal followed. Appellants challenge intervenors' entitlement to any award, as well as the reasonableness of the hours worked by Winfield, Parker and Kohn, the hourly rates awarded by the district court, and the fifty percent adjustment factor. Intervenors, appellees here, have cross-appealed on the issue of the hourly rates. They assert that the court erroneously used Mississippi rates rather than rates in the District of Columbia, where the suit was brought.

We now reverse and remand to the district court for further proceedings.

II. ENTITLEMENT TO FEES

Title 42 U.S.C. section 1973*l*(e) provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[6]

The purpose of this provision, as well as of section 1988,[7] a similar provision providing for award of attorneys' fees to prevailing parties in civil rights cases generally, is the familiar one of encouraging private litigants to act as "private attorneys general" in seeking to vindicate the civil rights laws. As the Senate Report on section 1973*l*(e) stated, "Congress depends heavily upon private citizens to enforce the fundamental rights involved. The awards are a necessary means of enabling private citizens to vindicate these Federal rights."[8] Although awarding fees pursuant to section 1973*l*(e) is discretionary, the legislative history makes clear that a prevailing party usually should recover fees: "A party seeking to enforce the rights protected by the Constitutional clause or statute under which fees are authorized by these sections, if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggy* [*Piggie*] *Park Enterprises, Inc.*, 390 U.S. 400, 402 [88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)."[9]

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[6] *Id.*

[7] *Id.* § 1988. The legislative purposes underlying § 1988 and § 1973*l*(e) are identical, and the two therefore should be construed similarly. *See, e.g., Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980).

[8] S.Rep. No. 295, 94th Cong., 1st Sess. 40 (1975), U.S. Code Cong. & Admin. News 1978, pp. 774, 807.

[9] *Id.*

Had this been a successful suit by these intervenors as plaintiffs against the Board of Supervisors, then, their entitlement to attorneys' fees would hardly be in doubt. The result of the litigation furthered the purpose of the Voting Rights Act. This case presents a more difficult problem, however, because the suit was brought by the Board of Supervisors against the United States, as represented by the Department of Justice. Intervenors participated on the side of the Department of Justice, but the significance of their efforts is in controversy. Appellants contend that intervenors' participation was subordinate and indeed unnecessary. They believe that the Department of Justice needed no aid in defending the suit, and prevailed on the basis of its own efforts. In appellants' view this duplicative role constitutes a "special circumstance" that renders an award of fees unjust. Intervenors counter that their aggressive litigation efforts impelled the Department of Justice into a strong defense, and that they produced facts and arguments of substantial value to the district court.

The legislative history of section 1973*l*(e) is silent on the appropriate standard for awarding attorneys' fees to intervenors who participate on the side of the United States in a successful suit. There is a single reference to attorneys' fees for such a party: "In the large majority of cases the party or parties seeking to enforce [civil] rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases (*e.g.*, a declaratory judgment suit under Sec. 5 of the Voting Rights Act), the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors." [10] This indicates that intervenors may be considered as prevailing parties entitled to an award of attorneys' fees. But we do not believe Congress intended

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[10] *Id.* at 40 n.42, U.S. Code Cong. & Admin. News 1975, p. 807. Likewise, the legislative history of § 1988 contains only this one reference to fees for intervenors. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976), U.S. Code Cong. & Admin. News 1978, p. 5908.

that such an award be as nearly automatic as it is for a party prevailing in its own right.

In the first place, the legislative history of sections 1973*l*(e) and 1988 emphasizes over and over again the critical goal of enabling private citizens to serve as "private attorneys general" in bringing suits to vindicate the civil rights laws. A typical statement of this purpose was made by Representative Holtzman during the House debates on the Civil Rights Attorneys' Fees Awards Act of 1976, which enacted section 1988:

> Plaintiffs who suffer discrimination and other infringements of their civil rights are usually not wealthy people. The organizations who have helped them bring their cases are frequently not well financed. The Justice Department does not have the resources to bring suit for every civil rights violation. Thus, many people, deprived of their civil rights, may not as a practical matter be able to do anything about it. It is not right to deny people who cannot afford to pay attorneys' fees the availability of justice through our courts.[11]

We think appellants have a valid point that this objective is far less compelling when the actual Attorney General participates in the case. Indeed, when the Justice Department defends a suit under section 5 it is acting on behalf of those whose rights are affected. It cannot be said that rights are being denied because of inability to pay attorneys' fees.

Appellees respond that their role differed from that of the Justice Department because their interests as voters in Warren County differed from the Department's interest as a whole. While there may be instances in which such a divergence exists between a defendant and a

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[11] 122 Cong. Rec. 35127 (1 Oct. 1976) (remarks of Rep. Holtzman).

defendant-intervenor,[12] this was not the case here. The interest of both the Attorney General and appellees was in preventing a dilution of black voting strength. We will not lightly infer that the Justice Department has violated this statutory obligation. In discussing the court's power to prevent intervention in proceedings for a declaratory judgment under section 4(a) of the Voting Rights Act, which is parallel to the provision in section 5, Judge Leventhal held for a three-judge district court:

> Congress assigned to the Attorney General the primary role in vindicating the public interest under the Act. We should be reluctant indeed to permit in-

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[12] For example, in *Baker v. City of Detroit*, 504 F. Supp. 841 (E.D. Mich. 1980), defendant-intervenors black police officers recovered attorneys' fees for their role in successfully defending a suit brought by the police officers' union against Detroit challenging an affirmative action plan voluntarily adopted by the city. The court noted that the city would be reluctant to admit that it had in the past discriminated against black officers, a reluctance which might impair its defense of the affirmative action plan.

A similar and even more significant, case is *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980), *prob. juris. noted*, —— U.S. ——, 102 S.Ct. 384, 70 L.Ed.2d 204 (1981). A school district sued to have a state initiative, which had the effect of outlawing the district's voluntary school desegregation program, declared unconstitutional under the fourteenth amendment. Eight public interest groups intervened in support of the district, and raised the alternative argument that the district operated an unconstitutional dual school system. The district court found the initiative unconstitutional, but subsequently refused to award any attorneys' fees to intervenors. The Ninth Circuit affirmed on the merits and partly reversed on the fees issue. It held that intervenors were entitled to fees on the second issue, since the school district, like the city of Detroit in *Baker*, would not have raised the argument that the system was unconstitutional. But the Ninth Circuit affirmed the district court's decision to deny fees on the first issue in the case, which was adequately covered by the school district. *See id.* at 1349. The Ninth Circuit thus held, as we do today, that intervenors may be denied fees where their participation was unnecessary in light of the efforts of the prevailing governmental litigant.

> tervention . . . in the absence of a plausible claim that the Attorney General is not adequately performing his statutory function, and that intervention is needed to enable the court properly to perform its declaratory function or in some other way to protect the public interest.
>
> However, if the Atorney General has been derelict or deficient, if the fact-finding process is warped or inadequate, the court has the authority and indeed may have the duty to allow intervention to cure or leave the deficiencies. Such intervention is not to be permitted except upon a strong showing.[13]

Not only is it assumed that the Attorney General will represent the interest of black voters, but the outcome of a declaratory judgment suit under section 5 does not bind private parties. Section 1973c provides that "a declaratory judgment entered under this section shall [not] bar a subsequent action to enjoin enforcement of [the voting] qualification, prerequisite, standard, practice, or procedure."[14] Thus further buttresses Judge Leventhal's point that the need for intervention in a declaratory judgment suit is quite limited. To adopt a standard that would permit an award of attorneys' fees in every case in which an intervenor participated on the side of the Department of Justice in a successful suit would encourage intervention even where there is no special need for it. It may be that the district courts have gotten away from Judge Leventhal's admonition and have been permitting intervention as a matter of course, but this is only an additional reason for carefully evaluating intervenors' fee requests.

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[13] *Apache County v. United States*, 256 F. Supp. 903, 908 (D.D.C. 1966) (three-judge court). *See also NAACP v. New York*, 413 U.S. 345, 368, 93 S.Ct. 2591, 2604, 37 L.Ed.2d 648 (1973) (upholding refusal to allow intervention where motion to intervene was untimely, noting that appellants did not substantiate their claim that the United States inadequately represented their interests).

[14] U.S.C. § 1973c (1976).

Given this background, we believe that in considering an intervenor's request for attorneys' fees the district court is obligated to examine the particular role played by the intervenor in the lawsuit. Although this question has not been definitely resolved before today, analogous holdings have been laid down. Courts have held that one type of "special circumstances" that creates an exception to the ordinary presumption in favor of granting attorneys' fees to a prevailing party is where, although plaintiffs received the benefits sought in the lawsuit, their efforts did not contribute to achieving those results." [15] An example is where a lawsuit was filed to achieve an objective that was already being achieved independently.[16] We think the same principle applies here as well. If a lawsuit is successful, but the intervenor contributed little or nothing of substance in producing that outcome, then fees should not be awarded.[17]

This holding is fully consistent with the few instances in which private parties have recovered fees under section 1988 even though a governmental entity was litigating on their side. In *Wade v. Mississippi Co-operative Extension Service*,[18] for example, the losing party chal-

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[15] *Connor v. Winter*, 519 F. Supp. 1337, 1343 (S.D.Miss. 1981) (three-judge court).

[16] *See, e.g., Bush v. Bays*, 463 F. Supp. 59, 66 (E.D.Va. 1978) (holding alternatively that plaintiffs were not prevailing parties and that an award would be unjust under the "special circumstances" doctrine) ("It is apparent to the Court that the attorneys for the plaintiffs in this case merely caught hold of a train on its way out of the station and are seeking to ride it to a substantial award of attorneys' fees. Plaintiffs' lawsuit played no part in firing the boiler, getting up a head of steam, or opening the throttle. Plaintiffs just went along for the ride.")

[17] The Ninth Circuit has agreed that fees may be denied intervenors under these circumstances. *See* note 12 *supra*.

[18] 378 F. Supp. 1251 (N.D. Miss. 1974), *vacated on other grounds*, 528 F.2d 508 (5th Cir. 1976), *award reinstated on remand*, 424 F. Supp. 1242 (N.D. Miss. 1976).

lenged the *plaintiffs'* entitlement to fees on the theory that the Justice Department, as plaintiff-intervenor, had done the bulk of the work. The court awarded fees to plaintiffs after finding that "counsel for the private plaintiffs, instead of playing a passive role, actively participated throughout in the prosecution of the case, assumed a great measure of responsibility for presenting evidence and independently prepared and submitted various legal memoranda of value to the court." [19] This is precisely the kind of determination we hold the district court must make if fees are to be awarded.[20]

Our holding is also consistent with this court's refusal in *Alabama Power Co. v. Gorsuch* [21] to award attorneys' fees to an intervenor participating on the side of the Environmental Protection Agency (EPA), which prevailed in a suit brought by industry petitioners. As Chief Judge Robinson stated for the court:

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[19] *Id.* at 1254. Cases such as *Wade*, where the private parties brought the suit and the government entity later intervened, obviously present a stronger case for award of fees. *See also United States v. Georgia Power Co.*, 474 F.2d 906, 927 (5th Cir. 1973) (award of fees to plaintiff in Title VII suit, which was joined by Attorney General).

[20] Other courts making awards in similar circumstances have also treated the entitlement issue as open, rather than holding, as appellees would have us do here, that being on the successful side is sufficient for obtaining an award of fees. *See, e.g., Northcross v. Bd. of Educ.*, 611 F.2d 624, 640 (6th Cir. 1979) (upholding award of fees to plaintiffs, who were joined in action by governmental entity, because specific finding by district court "disposes of any suggestion that the services . . . were not essential"), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980). *See also Usery v. Local Union No. 639 Int'l Bhd. of Teamsters*, 543 F.2d 369, 388 (D.C. Cir. 1976) upholding authority to award fees to intervenors under Labor-Management Reporting and Disclosure Act because ("[t]he efforts of union member intervenors may be of considerable assistance to the court and the Secretary, warranting assessment against the party ultimately benefitted—the union membership"), *cert. denied*, 429 U.S. 1123, 97 S.Ct. 1159, 51 L.Ed.2d 573 (1977).

[21] 672 F.2d 1 (D.C. Cir. 1982).

> If ever an intervenor can recover attorneys' fees from a party on whose side it participated—a question we do not here reach—the justification would have to be a clear showing of some unique contribution of the intervenor to the strength of that party's legal position. Here, the environmental groups have not demonstrated with any sort of particularity that their intervention added in any essential way to EPA's stance on the issues involved. Without deciding more, we hold that wherever the bounds on fee awards to such intervenors should be set, this threshold burden has not been met. [22]

In *Alabama Power* the intervenors sought an award from the EPA, the very governmental entity that had prevailed in the suit, whereas here intervenors seek attorneys' fees from appellants, who lost the suit. Nonetheless, we believe that the essential principle is the same in both situations. Where Congress has charged a governmental entity to enforce a statutory provision, and the entity successfully does so, an intervenor should be awarded attorneys' fees only if it contributed substantially to the success of the litigation. This inquiry primarily entails determining whether the governmental litigant adequately represented the intervenors' interests by diligently defending the suit. It also entails considering both whether the intervenors proposed different theories and arguments for the court's consideration and whether the work it performed was of important value to the court.

By providing for attorneys' fees to be awarded in actions brought to vindicate the civil rights laws, Congress did not intend to allow private litigants to ride the back of the Justice Department to an easy award of attorneys' fees. Obviously, if an intervenor did nothing but simply show up at depositions, hearings, and the trial itself, and spend lots of time reading the parties'

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[22] *Id.* at 4.

documents, an award of attorneys' fees would be inappropriate. The same would be true if the intervenors' submissions and arguments were mostly redundant of the Government's or were otherwise unhelpful. We do not say that this is true of intervenors here, but only that the district court should find out and assess the signficance of their efforts in the case.

The court failed to make this determination, leaving the parties' vigorous dispute unresolved. Appellants claim that intervenors contributed nothing the Government did not also contribute, pointing as an example to intervenors' failure to submit their own proposed findings of fact and conclusions of law. Intervenors contend that the Justice Department's proposed findings and conclusions were the product of both the Department and intervenors, and in general they argue that their efforts were critical in forcing the Justice Department to conduct an active defense. On remand the district court should resolve this controversy and determine if fees are appropriate.

III. CALCULATIONS OF THE FEES

In this section we deal with the challenges raised by both parties to the district court's calculation of the amount of fees awarded. Of course, if the district court on remand finds that intervenors are not entitled to any fees, the discussion in this section will become moot.

A. *Hours Reasonably Expended*

Appellants challenge the number of hours attorneys for appellees claim to have worked on this case, asserting primarily that there was substantial duplication among the tasks performed by the three attorneys who worked on the merits of the litigation.[23] In particular they challenge the billing hours attributed to Winfield, the local Mississippi attorney for appellees. For example, appel-

[23] The hours worked by Phillips on the attorneys' fees application are not in controversy.

lants note that twenty-five entries by Winfield of time spent analyzing various documents are identical to those reported by lead counsel Parker. Based on this, appellants claim that the district court should conduct an evidentiary hearing to determine not only whether these entries were indeed duplicative and unnecessary, but also whether Winfield performed any substantial function in the proceedings at all. In addition, appellants allege that the time spent by Kohn, the District of Columbia counsel, was unnecessary, and that Parker also spent an excessive amount of time on the case.

The district court brushed off these objections summarily:

> Intervenors' attorneys provided detailed records of the time logged and services rendered. The Court has examined them carefully and finds that they are reasonable. The duplication of hours between attorneys for certain work, which was pointed out by the plaintiffs, does not concern the Court. This case was a complicated one entailing extensive document work. It necessarily involved some duplication of effort by the attorneys so that each could understand the case properly.[24]

The court went on to approve all hours submitted, with the exception of 9.2 hours submitted by Winfield for time spent at depositions, where the plaintiffs had submitted affidavits from the deponents stating that Winfield was not present.

We find no fault with the district court's decision to allow all the hours claimed by Kohn and Parker. The only challenge appellants have raised with regard to Kohn is that his role was entirely redundant. But we believe it was reasonable for appellees to have an attorney in Washington, D.C., who was prepared to take what-

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[24] Civ. No. 78-392, memorandum opinion (mem. op.) at 4 (D.D.C. 18 Feb. 1981).

ever actions might be necessary in the district court. The hours submitted by Kohn seem reasonable, and given the absence of any particular challenge by appellants we can find no problem with the court's decision.

Appellants similarly have failed to specify their challenges to Parker's claimed hours. We emphasize that the party challenging an application for fees should frame its objections with specificity. The district court cannot inquire into the reasonableness of every action taken and every hour spent by counsel, and it will consider objections to filed hours only where it has been presented with a reasonable basis for believing the filing is excessive.[25] No such basis exists here, and we uphold the decision regarding Parker's hours.

We find that the district court erred, however, in refusing to inquire into the matter of hours worked by Winfield. In *Copeland v. Marshall* we stated: "It is axiomatic that we cannot identify an unreasonable award unless it is accompanied by a statement of reasons." [26] In this instance appellants raised specific and substantial questions about Winfield's hours worked yet the district court never stated specifically why it found no merit in appellant's claims. Although the court may be correct that a complicated case "necessarily involves some duplication of effort," that rationale cannot be dispositive. The submission of so many identical time entries inevitably raises questions about exactly what the attorneys did and whether it was necessary. And given the different roles played by Winfield and Parker, their submission of identical time records for analyzing these many

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[25] *See generally National Ass'n. of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 at 1329-30 (D.C. Cir. 1982); *Copeland v. Marshall*, 641 F.2d 880, 903 (D.C. Cir. 1980) (en banc).

[26] 641 F.2d 880, 901 n.39 (D.C. Cir. 1980) (en banc).

documents presents the question whether such extensive duplication was warranted.[27]

This is especially true given the prior question whether intervenors played a necessary role in this case at all. Even if the district court finds that intervenors' participation in the case was important and substantial, there yet remains the question whether this participation needed to be so extensive given the central role played by four attorneys from the Department of Justice.[28] Appellants have raised compelling questions regarding Winfield's participation, particularly in light of the leading and sometimes almost exclusive role Parker assumed on behalf of intervenors. Parker is an extremely experienced voting rights attorney, and he has participated extensively in Mississippi litigation. Even if some additional local expertise was needed, which was intervenors' justification for Winfield's participation in the litigation, there is an open question whether there was a need for the local attorney to read every document and otherwise act as a major co-counsel. The fact that Winfield's time submissions in a great many instances are identical to those of Parker only adds to the need for an investigation of this issue.

In *National Association of Concerned Veterans v. Secretary of Defense*[29] this court emphasized that in most

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[27] The issue is not whether intervenors used too many attorneys, but whether the work performed was unnecessary. *See, e.g., Tasby v. Estes*, 651 F.2d 287, 289 (5th Cir. 1981). Even if there was justification for the use of three attorneys performing different roles, that does not necessarily imply that every attorney needed to read every document in the case. And the existence of numerous identical time submissions raises a question whether each attorney actually did read every document or whether each attorney had an accurate understanding of his particular role in the litigation.

[28] *Cf. Baker v. City of Detroit*, 504 F. Supp. 841, 851 (E.D. Mich. 1980) (awarding fees to intervenors, noting "that this sum should not be onerous" because "intervenors did not take part in most pretrial discovery" and "played a subsidiary role [at trial]").

[29] 675 F.2d 1319 (D.C. Cir. 1982).

cases questions regarding an attorneys' fee application can be resolved without an evidentiary hearing. We also held, however, that "procedural fairness requires that a hearing be held where in the District Court's view material issues of fact that may substantially affect the size of the award remain in well-founded dispute."[30] We hold that the district court abused its discretion in summarily resolving the issues with regard to Winfield's time submission. On remand an evidentiary hearing should be held to determine the reasonableness of the time charges submitted by Winfield. The district court should consider any specific challenges by appellants to Winfield's participation, such as their objections to the duplicative entries and to the generalized billing of twenty hours for time spent with clients.

B. *Reasonable Hourly Rate*

Both parties have appealed on the hourly rate issue. Appellants challenge the rates awarded as excessive. The court initially awarded $60 per hour for Parker and Kohn, $50 per hour for Winfield, and $40 per hour for Phillips. It subsequently increased these rates to $85 per hour for Parker and Kohn and $60 per hour for Winfield and Phillips. This increase was in response to intervenors' motion for reconsideration based on recent decisions awarding attorneys' fees for litigation in Mississippi. Although appellees thus were awarded rates in excess of those appellants claim are the maximum for experienced attorneys in Mississippi, appellees have cross-appealed claiming that the district court should have based their fees on the customary rates charged in the District of Columbia, where the lawsuit was filed.

We uphold the cross-appeal with regard to Parker, Kohn, and Phillips, finding that these attorneys are entitled to rates customarily charged in the District of Columbia. On remand the district court should determine the hourly rates to be awared to these three attorneys.

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[30] *Id.*, at 1330.

We hold that Winfield's rates should be determined on the basis of the prevailing market rate in Mississippi, as his participation in the case was premised entirely on his local expertise. We vacate the district court's award of $60 per hour to Winfield, and remand for a new determination of his appropriate hourly rate.

Copeland v. Marshall held: "The reasonable hourly rate is that prevailing in the community for similar work." [81] Usually no problem arises in choosing the relevant community because the lawyers work in the community in which the suit was brought. The difficulty arises when lawyers come from out of town to litigate the suit. The issue here is whether the relevant community is the District of Columbia, where the suit was brought, or Mississippi, which was the source of the controversy at issue and the place where most of the work was performed.

We recognize the logic on both sides of the argument, but hold that the proper rule is that the relevant community is the one in which the district court sits. This is a simple rule to follow. It requires the district court normally to determine only the prevailing market rate within its jurisdiction, an inquiry about which it should develop expertise. Moreover, it is a neutral rule which will not work to any clear advantage for either those seeking attorneys' fees or those paying them. High-priced attorneys coming into a jurisdiction in which market rates are lower will have to accept those lower rates for litigation performed there. Similarly, some attorneys may receive fees based on rates higher than they normally command if those higher rates are the norm for the jurisdiction in which the suit was litigated. Although there may be cases, such as this one, where much of the work must be performed away from the district's community, we do not believe that this alone provides a

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[81] 641 F.2d at 892.

sufficient reason for deviating from the general rule. This position is consistent with that of other federal courts.[32]

There are some situations, however, in which the rule should not be followed. Courts have held that the hourly rate of the Lawyer's community, as opposed to the district court's community, should be awarded if there are compelling reasons why the services performed by that attorney were unavailable within the court's jurisdiction. For example, the Seventh Circuit has stated:

> If a high priced, out of town attorney renders services which local attorneys could do as well, and there is no other reason to have them performed by the former, then the judge, in his discretion, might allow only an hourly rate which local attorneys would have charged for the same service. On the other hand, there are undoubtedly services which a local attorney may not be willing or able to perform. The complexity and specialized nature of a case may mean that no attorney, with the required skills, is available locally.[33]

Thus, if a *particular* attorney's services are necessary, the proper hourly rate is that prevailing in that attorney's local community.

Applying these criteria to this case, we find that Parker, Kohn, and Phillips should have been awarded District of Columbia hourly rates. Kohn served entirely as Washington, D.C., counsel, and thus D.C. rates are entirely appropriate. Parker served as lead counsel, mak-

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[32] *See, e.g., McPherson v. School Dist. #186*, 465 F. Supp. 749, 760 (S.D. Ill. 1978); *Donaldson v. O'Connor*, 454 F. Supp. 311, 314 (N.D. Fla. 1978) (citing cases).

[33] *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 at 768 (7th Cir. 1982). *See also Donaldson v. O'Connor*, 454 F. Supp. 311, 315 (N.D. Fla. 1978) (holding that "where, as here, a plaintiff can show he has been unable through diligent, good faith efforts to retain local counsel, attorney's fees under 42 U.S.C. § 1988 are not limited to the prevailing rate in the district where the case is tried.").

ing him responsible for all intervenors' positions in the case, including at the trial itself. Although he works primarily out of Mississippi, his role in the litigation extended to the trial in D.C. as well as the gathering of evidence in Mississippi. District of Columbia rates are therefore appropriate. Finally, Phillips is also entitled to D.C. rates, even though she works in the Lawyers' Committee's Mississippi office. Her function of preparing the attorneys' fees application was directed entirely toward convincing the district court, and it could have been done by any local District of Columbia attorney.

The appropriate rate for Winfield, in contrast, is that prevailing in Mississippi. His role in the case fits squarely within the exception to the rule that the district court's community should be used in determining the hourly rate. The justification for Winfield's participation in the case was, in appellees' own words,

> "his expertise in and extensive knowledge of local Warren County conditions, particularly the location of black population concentrations in Vicksburg and Warren County, population shifts since the 1970 Census, the location of streets and other boundaries used in the plaintiffs' proposed redistricting plan, the history of discrimination against black people in Warren County, and the current grievances of the black community against the Board of Supervisors." [34]

Winfield thus was hired for his particular expertise, and his function could not have been duplicated by an attorney from the District of Columbia. The proper hourly rate, therefore, is the normal one in Mississippi.

The district court awarded Winfield $60 per hour, but we vacate this award and remand for a new determination. Intervenors sought to recover District of Columbia rates for all their attorneys, and thus provided little evi-

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[34] Brief for Appellees at 27.

dence on Mississippi rates. Winfield simply asserted that "[f]or a case of this magnitude and significance, my hourly rate is $75.00 per hour." [35] If this was meant to indicate the rate Winfield normally charges when he performs work for a fee, then he should provide specific supporting evidence, as required by *National Association of Concerned Veterans*.[36] The cases provided by intervenors showing rates awarded for Mississippi services in other litigations are legitimate pieces of evidence, though the weight given them by the district court should depend on whether "they were determined based on actual evidence of prevailing market rates, the attorneys involved had similar qualifications, and isues of comparable complexity were raised." [37] Any further evidence adduced by Winfield in support of his claimed rate, or evidence offered by appellants to support a lower rate, should be evaluated in accordance with *Concerned Veterans*, as of course should the evidence regarding the rates for the other three attorneys.

C, *Adjustments to the Lodestar*

The final point of contention is the district court's decision to adjust the lodestar upward by a factor of 1.5. The court reasoned as follows:

> This case was a contingent one for intervenors' attorneys, who work for a private charitable civil rights legal organization, the Lawyers' Committee for Civil Rights. The Lawyers' Committee has no fee arrangement with its clients and is substantially dependent upon court awards of attorneys' fees to continue its work. Additionally, this case presented issues of first impression to this Court. It is the first one in which a proposed plan to redistrict a county was challenged as racially discriminatory and as an

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[35] Affidavit of James E. Winfield at 4, *reprinted in* J.A. at 34.

[36] 675 F.2d at 1325-26.

[37] *Id.* at 1325 n.7.

> attempt to gerrymander district lines to dilute the black voting strength. Finally, the intervenors' quality of representation was unusually and consistently high.[38]

We vacate this aspect of the award and remand for a new determination of what adjustment, if any, should be made to the lodestar.

In *Copeland v. Marshall* this court held that an adjustment to the lodestar may be appropriate to compensate for certain factors such as the contingent nature of success, delay in receipt of payment, and the quality of representation. The decision left open the possibility that other factors may be relevant in adjusting the lodestar up or down, but these three have remained the basic considerations.[39]

Applying this framework to the district court's reasoning in support of the upward adjustment, we first note that the court improperly relied on its view that the case presented issues of first impression. We do not believe such a consideration is appropriate in determining whether to adjust the lodestar fee.[40] If a case was par-

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[38] Mem. op. at 4-5, *reprinted in* J.A. at 16-17.

[39] 641 F.2d at 892-94.

[40] Even were we to find this consideration relevant, we would disagree with the district court that this case presented issues of first impression. That this was the first case in this circuit to deal with *county* redistricting is not dispositive. This circuit has dealt before with cases under the Voting Rights Act involving the legality of a redistricting scheme. *See, e.g., Mississippi v. United States*, 490 F. Supp. 569 (D.D.C. 1979) (three-judge district court), *aff'd mem.*, 444 U.S. 1050, 100 S.Ct. 994, 62 L.Ed.2d 739 (1980). We perceive no difference between the applicable law on county redistricting and that on redistricting of other governmental jurisdictions. Moreover, many county redistricting cases have been decided elsewhere. Intervenors' lead counsel Parker alone has listed five Mississippi county redistricting cases on which he served as lead counsel for black plaintiffs. Affidavit of Frank R. Parker at 7, *reprinted in* J.A. at 2.

ticularly difficult, it probably required a large number of hours of attorney time, a factor which will show up in the lodestar calculation.[41] And if especially talented counsel were necessary to litigate the case, this fact will be reflected in the hourly rate used in setting the lodestar fee. In addition, the complexity and uncertainty of the issues in the case are considerations in determining whether there was a possibility that no fees would be recovered and therefore whether a contingency adjustment is appropriate.[42] Finally, there remains a possibility of upward adjustment based upon the quality of a representation or the nature of the results achieved. Any further consideration of the first impression nature of the issues is therefore unwarranted as it would be duplicative.

The district court properly considered the contingent nature of the representation by attorneys for appellees. Appellants have not asserted the existence of a fee arrangement between appellees and their attorneys, and accordingly it was proper to provide an adjustment for the contingency that no fees would be awarded.[43] An additional factor which the district court could have considered, but did not, was the delay in payment of the

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[41] *See Copeland*, 641 F.2d at 890.

[42] *See* note 43 *infra*. *See also Environmental Defense Fund, Inc. v. EPA*, 672 F.2d 42, 60-61 (D.C. Cir. 1982) ("It is true that the case is extremely important and very complicated, and that EDF counsel performed with great skill; however, these factors are fully compensated by the amounts credited under the categories of 'hours reasonably expended' and 'reasonably hourly rates.' ").

[43] The court should, however, inquire specifically into the actual probability that intervenors would have lost the case and thus recovered no fees. *See Copeland*, 641 F.2d at 893 (Since "it is difficult in hindsight to determine the risk of failure at the commencement of a lawsuit that ultimately proved to be successful . . . we ask only that the district court judges exercise their discretion as conscientiously as possible, and state their reasons as clearly as possible.").

fees. Of course, as we cautioned in *Copeland*, "if the 'lodestar' itself is based on *present* hourly rates, rather than the lesser rates applicable to the time period in which the services were rendered, the arm resulting from delay in payment may be largely reduced or eliminated." [44]

We disagree strongly, however, with the district court's decision to base the adjustment in part on its view that "the intervenors' quality of representation was unusually and consistently high." [45] We have found it all too common for the district courts to adjust the lodestar upward to reflect what the courts view as a high level of quality of representation. This trend should stop. *Copeland* contemplated such adjustments only for rare cases: "A quality adjustment is appropriate only when the representation is unusually good or bad, *taking into account the level of skill normally expected* of an attorney commanding the hourly rate used to compute the 'lodestar.'" [46] As we stated in *Concerned Veterans*: "The Court could not have stated in clearer terms that an adjustment for the quality of representation should not be routinely awarded but only awarded in exceptional cases. An adjustment should not be made out of sympathy for claimant's cause or to mollify counsel because the lodestar figure claimed was reduced." [47]

Of course it remains within the district court's discretion to make this quality determination. But in this case the district court's own opinion demonstrates conclusively that a quality adjustment was not warranted. In the initial part of its opinion discussing the reasonable hourly rates, the court stated:

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[44] *Id.* at 893 n.23. *See also Concerned Veterans*, at 1328.

[45] Mem. op. at 5, *reprinted in* J.A. at 17.

[46] 641 F.2d at 893.

[47] At 1328.

> Frank Parker, the lead counsel, is an experienced and able specialist in the field of reapportionment and county redistricting. In the instant litigation, he presented his case with efficiency and clarity. His performance was generally of high quality. James Winfield and Richard Kohn, while not specialists in their field, also ably represented their clients. Barbara Phillips, a recent law school graduate, prepared the intervenors' application for attorneys' fees and costs.[48]

As regards Phillips, it is obvious that the district court found nothing exceptional in her performance. Indeed, it is almost incredible that her performance could have been exceptional, given that her function was simply to prepare the application for attorneys' fees and costs. As regards Winfield and Kohn, the district court found that they "ably represented their clients." Far from representing an unusually high quality of representation, "able representation" is the minimum that every client is entitled to expect from his attorney. And "efficiency and clarity" and performance "generally of high quality," which was how the district court described Parker's performance, is precisely what one would expect from an attorney particularly experienced in this field serving as a party's lead counsel in a complex litigation. Based on these descriptions the district court's determination that attorneys for appellees were entitled to an upward adjustment for the quality of their representation was erroneous as a matter of law.[49]

We hasten to emphasize that in no way do we denigrate the capabilities and performances in this litigation

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[48] Mem. op. at 2-3, *reprinted in* J.A. at 14-15.

[49] We note also that if the district court felt that, say, one of the four attorneys had performed unusually well, it should have awarded an adjustment only for that attorney's lodestar amount. The special quality of one lawyer's services provides no logical basis for granting all the lawyers a quality adjustment.

of the attorneys for appellees. But the district court made every effort to ensure that these attorneys were awarded an appropriate market rate for attorneys of their experience and for this type of litigation. We have no doubt that the district court will do the same on remand, if it finds fees are warranted, when it determines the appropriate District of Columbia rates for Parker, Kohn, and Phillips, and the appropriate Mississippi rate for Winfield. But as this court recently held in *Environmental Defense Fund, Inc. v. EPA*, no quality adjustment is appropriate when, "while the 'quality of representation' . . . was first-rate, the work done clearly was performed at levels of efficiency that were within the usual range of these experienced lawyers' skills."[50] The district court's own description of the level of representation in this case makes clear that the work done was not exceptional, but rather performed at levels one should expect from these lawyers.[51]

IV. CONCLUSION

On remand the court should first determine appellees' general entitlement to attorneys' fees in this case. If the court finds that fees are appropriately granted, it should then conduct an evidentiary hearing to determine the reasonable number of hours worked by Winfield, in light of the discussion in this opinion. The court should also determine the prevailing market rate in the District of Columbia for attorneys similar to Parker, Kohn, and

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[50] 672 F.2d 42, 64 (D.C. Cir. 1982). *See also id.* at 60-61, *quoted at* note 42 *supra*.

[51] *Copeland* also provides, under the rubric of quality of representation, that the court may adjust the lodestar upward if the attorney has "obtained an exceptional result for the client." 641 F.2d at 894. This means a result substantially better than could reasonably have been expected. The district court properly did not rely on that standard below, as the result obtained here was not exceptional, even though it was an important one which furthered the goals of the Voting Rights Act.

Phillips, and in Mississippi for attorneys similar to Winfield. Having thus calculated the lodestar fee, the court should then determine an adjustment to the lodestar, if any is deemed appropriate, based on the contingent nature of this suit and on the delay in receipt of payment, if the hourly rates used in calculating the lodestar are not present hourly rates. The court may not include an upward adjustment for the quality of representation, as we have held that court's own opinion shows that an adjustment is unwarranted.

Reversed and remanded.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-392

CLYDE R. DONNELL, *et al.*,
Plaintiffs

v.

UNITED STATES OF AMERICA and GRIFFIN BELL, Attorney General, etc.,
Defendants

and

EDDIE THOMAS, SR., *et al.*,
Defendant-Intervenors

[Filed Feb. 19, 1981]

MEMORANDUM OPINION

This case is before the Court on defendant-intervenors' application for attorneys' fees and costs pursuant to 42 U.S.C. § 1973 l(e). Defendant-intervenors (intervenors) and the United States Government were the prevailing parties in a voting rights action brought under 42 U.S.C. § 1973c. They successfully challenged as racially discriminatory the 1978 county redistricting plan drawn by Warren County, Mississippi Board of Supervisors. The District Court ruling was affirmed by the Supreme Court, *United States v. Board of Supervisors of Warren County, Mississippi*, 100 S. Ct. 1000 (1980).

Intervenors seek the following award:

Attorneys Fees

Frank N. Parker	381.05 hrs. at $100 per hr.	$38,105.00
James E. Winfield	191.35 hrs. at $ 75 per hr.	14,351.25
Richard S. Kohn	47 hrs. at $100 per hr.	4,700.00
Barbara Y. Phillips	30 hrs. at $ 75 per hr.	2,250.00
		$59,406.25
$59,406.25 attorney hours x 1.5 (lodestar)	(enhancement)	$89,109.38

Litigation Expenses

Meals and lodging	$ 421.21
Gas	218.26
Federal Express	179.17
Reproduction of maps	723.77
Preparation of plans	620.00
Copying	120.00
Consultant fees	55.00
Airline tickets	643.00
Telephone expenses	40.00
Printing of Supreme Court brief	514.30
Deposition copies	2,025.68
	$ 5,560.29
TOTAL AWARD	$94,669.67

The Court awards reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1973 l(e). As outlined in *Copeland v. Marshall*, No. 77-1351, (D.C. Cir. Sept. 2, 1980), Slip Op. at 19-26 (hereinafter Copeland III), the court initially determines a lodestar award, which is the reasonable number of hours spent on the case times a reasonable rate for the various persons who worked on the case. The court then adjusts the lodestar up or down after examining and weighing the 12 criteria established in *Johnson v. Georgia Highway, Inc.*, 488 F.2d 714 (1974), the most important criteria being the contingent nature of the fee and the quality of representation.* *Copeland III* at 22-26.

* The Johnson criteria were (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment; (5) the customary fee in the community for

The Court first addresses its duty to set reasonable hourly rates. Frank Parker, the lead counsel, is an experienced and able specialist in the field of reapportionment and county redistricting. In the instant litigation, he presented his case with efficiency and clarity. His performance was generally of high quality. James Winfield and Richard Kohn, while not specialists in the field, also ably represented their clients. Barbara Phillips, a recent law school graduate, prepared the intervenors' application for attorneys' fees and costs.

The Court fixes the rate of compensation at "that prevailing in the community for similar work." *Copeland III*, Slip Op. at 21. The typical attorney's fees for litigation of this specialized nature in Mississippi range from $50.00 to $65.00 per hour. Attorneys right out of law school receive about $30.00 per hour. Plaintiffs' attorneys received $50.00 per hour for their work. Mr. Parker, Mr. Winfield and Ms. Phillips practice in Mississippi. The case arose in Mississippi and was primarily prepared in Mississippi. The case was tried in Washington, D.C. because of the statutory requirements that it be brought here.

The primary purpose of awarding fees in cases brought under the Civil Rights Act of 1964 is "to encourage individuals injured by racial discrimination to seek judicial relief." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *see also Copeland III*, Slip Op. at 18. In providing reasonable and sufficient compensation for attorneys, an important consideration is "the custom or rule in the place of . . . [an attorney's] practice." *Ranger Insurance Company v.*

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similar work; (6) the fixed or contingent nature of the fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson* at 717-19.

Algie, 482 F.2d 861 (5th Cir. 1973). This Court finds awarding intervenors in the instant case attorneys' fees at Mississippi rates and their costs of travel provides them sufficient incentive and compensation to take this case and ones like it. The cases cited by intervenors, who argue that D.C. rates should guide the Court, actually support this Court's position. In many, the Court ruled that the local rates of the instant court be applied in cases arising in the same locale and argued by local attorneys. *Pugh v. Rainwater*, 465 F. Supp. 41, 44-45 (S.D. Fla. 1979); *Guajardo v. Estelle*, 432 F. Supp. 1373 (S.D. Tex. 1977); *accord Donaldson v. O'Connor*, 454 F. Supp. 311, 314 (N.D. Fla. 1978).

In conclusion, this Court will apply Mississippi rates. Accordingly, Mr. Parker will be compensated at the rate of $60.00 per hour as was the lead counsel and the specialist. Mr. Winfield will receive $50.00 per hour and Ms. Phillips $40.00 per hour. Mr. Kohn, the local counsel, will receive the same as Mr. Parker, $60.00 per hour.

The Court must next determine the reasonable number of hours spent by the attorneys. Intervenors' attorneys provided detailed records of the time logged and services rendered. The Court has examined them carefully and finds that they are reasonable. The duplication of hours between attorneys for certain work, which was pointed out by the plaintiffs, does not concern the Court. This case was a complicated one entailing extensive document work. It necessarily involved some duplication of effort by the attorneys so that each could understand the case properly.

The Court finds it necessary to make only one reduction in hours. Mr. Winfield claims attorney's fees for the time he spent at four depositions at which his presence was not recorded by the reported. By affidavit, he claims he has an independent recollection that he was present at each deposition. However, for two of the deposition sessions in question, plaintiffs have filed affidavits from the deponents stating that Mr. Winfield was

not present. Accordingly, the Court reduces Mr. Winfields' time request by 9.2 hours, which represents the time Mr. Winfield spent at the two depositions where his presence is disputed by deponents.

In accordance with the above, the Court finds the following number of hours to be reasonable:

Frank Parker	381.05 hours
James Winfield	182.15 hours
Richard Kohn	47 hours
Barbara Phillips	30 hours

The above determinations amount to a lodestar figure of $35,990.50. However, this figure should be adjusted upward. This case was a contingent one for intervenors' attorneys, who work for a private charitable civil rights legal organization, the Lawyers' Committee for Civil Rights. The Lawyers' Committee has no fee arrangement with its clients and is substantially dependent upon court awards of attorneys' fees to continue its work. Additionally, this case presented issues of first impression to this Court. It is the first one in which a proposed plan to redistrict a county was challenged as racially discriminatory and as an attempt to gerrymander district lines to dilute the black voting strength. Finally, the intervenors' quality of representation was unusually and consistently high. In accordance with *Copeland III*, the Court raises the intervenors' attorneys' fees award to $50,400. *Id.* at 22-26.

The Court will not rule on the issue of costs presently before it. The documentation provided by the intervenors is insufficient to allow the Court to review their application meaningfully. However, the Court will hold the issue of costs in abeyance until such time as intervenors provide a detailed justification of their request.

A separate order is attached.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

Dated: February 18, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-392

CLYDE R. DONNELL, *et al.*,
Plaintiffs

v.

UNITED STATES OF AMERICA and
GRIFFIN BELL, Attorney General, etc.,
Defendants

and

EDDIE THOMAS, SR., *et al.*,
Defendant-Intervenors

[Filed March 20, 1981]

ORDER

Upon consideration of defendant-intervenors' motion to alter and amend this Court's Order awarding attorneys' fees of February 19, 1981, and the memoranda filed by the parties, it is by the Court this 20th day of March 1981,

ORDERED that this Court's Memorandum Opinion and Order of February 19, 1981, are hereby altered and amended to award Frank R. Parker and Richard S. Kohn fees at the rate of $85.00 per hour, and James E. Winfield and Barbara Y. Phillips fees at the rate of $60.00 per hour, plus an enhancement of 1.5, for the reasons stated in the Court's Memorandum Opinion of February 19, 1981; and it is further

ORDERED that intervenors shall recover from the plaintiffs an award of attorneys' fees of $73,669.88.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX C

PARKER ENTRY	TIME	WINFIELD ENTRY	TIME
1. *Analysis of Board of Supervisors' Plan, May 20, 1978*	6	*Analysis of Board of Supervisors' Plan, May 20, 1978*	6
2. *Meeting with clients, May 24, 1978 (includes preparation)*	8	*Meeting with clients, May 24, 1978 (includes preparation)*	8
3. Meeting with clients, May 31, 1978	2	Meeting with clients, May 31, 1978	4
4. Motion to intervene and answer in intervention, filed June 5, 1978	4	None	
5. *Depositions of Charlie Steele, James Wilson and Mrs. Charlie Hunt, June 3 1978*	9	*Depositions of Charlie Steele, James Wilson, and Mrs. Charlie Hunt, June 3 1978*	9
6. Depositions of Eddie Thomas, Levi Brown, and Simon Kemp, June 5, 1978	8	Depositions of Eddie Thomas, Levi Brown, and Simon Kemp, June 5, 1978	5
7. Deposition of St. Clair Mitchell and Robert Pickett, July 13	5.6	None	
8. Depositions of Tommie Lee Williams and Wright L. Lassiter, July 14	6.7	None	
9. Depositions of Alexander M. Peters, Barry A. Weinberg, and Lisbon C. Berry, Jr., July 20	3.8	None	
10. Preparation of defendants-intervenors' interrogatories to plaintiffs and their agents, served July 25, 1978	9	Preparation of defendants-intervenors' interrogatories to plaintiffs and their agents, served July 25, 1978	5
11. Deposition upon written questions of Drew S. Days, III, Asst. Attorney General, filed July 27, 1978	9	None	
12. Analysis of plaintiffs' request to produce and interrogatories to defendants and their agents, August 21	1.5	Analysis of plaintiffs' request to produce and interrogatories to defendants and their agents, August 21	1
13. *Analysis of defendants' interrogatories to plaintiffs' and request for production of documents, Sept. 18*	.25	*Analysis of defendants' interrogatories to plaintiffs' and request for production of documents, Sept. 18*	.25

* Italicized entries indicate those in which identical times are billed.

PARKER ENTRY	TIME	WINFIELD ENTRY	TIME
14. *Analysis of plaintiffs' interrogatories to intervenors, served Oct. 13*	2	*Analysis of plaintiffs' interrogatories to intervenors, served Oct. 13*	2
15. Analysis of plaintiffs' answers to intervenors' interrogatories, received October 21	7	Analysis of plaintiffs' answers to intervenors' interrogatories, received October 21	3
16. Analysis of defendants' answers to plaintiffs' interrogatories and defendants' response to plaintiffs' request for production, filed Nov. 27	2	Analysis of defendants' answers to plaintiffs' interrogatories and defendants' response to plaintiffs' request for production, filed Nov. 27	1.5
17. Intervenors' notice of depositions, Nov. 27	1	None	
18. Depositions of Clyde R. Donnell and Paul A. Pride, November 30 (including preparation)	12.6	Depositions of Clyde R. Donnell and Paul A. Pride, November 30	8
19. *Deposition of Thomas Akers, Dec. 1*	3.2	*Deposition of Thomas Akers, Dec. 1*	3.2
20. *Deposition of Hoyt T. Holland, Jr., Dec. 2 (including preparation)*	8.4	*Deposition of Hoyt T. Holland, Jr., Dec. 2 (including preparation)*	8.4
21. Discussion with counsel re Joint motion to extend discovery	.50	None	
22. *Deposition of George Culkin, Dec. 12 (including preparation)*	4.2	*Deposition of George Culkin, Dec. 12 (including preparation)*	4.2
23. Analysis of defendants' request to produce and second set of interrogatories to plaintiffs, Dec. 13	2	Analysis of defendants' request to produce and second set of interrogatories to plaintiffs, Dec. 13	1
24. *Analysis of plaintiffs' response to defendants' first interrogatories, received Dec. 18*	1	*Analysis of plaintiffs' response to defendants' first interrogatories, received Dec. 18*	1
25. *Analysis of defendants' amended response to Days' deposition, received January 8, 1979*	1	*Analysis of defendants' amended response to Days' deposition, received January 8, 1979*	1
26. Analysis of answers to deposition upon written questions of Asst. Att'y Gen. Drew S. Days, III, received Jan. 9, 1979	4	Analysis of answers to deposition upon written questions of Asst. Att'y Gen. Drew S. Days, III, received Jan. 9, 1979	1

* Italicized entries indicate those in which identical times are billed.

PARKER ENTRY	TIME	WINFIELD ENTRY	TIME
27. Preparation of intervenors' answers to plaintiffs' interrogatories, served Feb. 2	30	Preparation of intervenors' answers to plaintiffs' interrogatories, served Feb. 2	15
28. *Analysis of plaintiffs' answers to second set of defendants' interrogatories, received Feb. 3*	2	*Analysis of plaintiffs' answers to second set of defendants' interrogatories, received Feb. 3*	2
29. *Analysis of plaintiffs' motion to compel defendants to answer interrogatories and memorandum, received Feb. 8*	.25	*Analysis of plaintiffs' motion to compel defendants to answer interrogatories and memorandum, received Feb. 8*	.25
30. *Analysis of defendants' motion for inspection of documents and memorandum, received Feb. 10*	.25	*Analysis of defendants' motion for inspection of documents and memorandum, received Feb. 10*	.25
31. *Analysis of defendants' memorandum in response to plaintiffs' motion to permit inspection, filed Feb. 8*	.25	*Analysis of defendants' memorandum in response to plaintiffs' motion to permit inspection, filed Feb. 8*	.25
32. *Analysis of defendants' supp. answers to plaintiffs' interrogatories*	.50	*Analysis of defendants' supp. answers to plaintiffs' interrogatories*	.50
33. *Analysis of defendants' motion to compel answers to interrogatories and memorandum, received Feb. 12*	.50	*Analysis of defendants' motion to compel answers to interrogatories and memorandum, received Feb. 12*	.50
34. *Analysis of defendants' supp. responses to plaintiffs' first interrogatories and defendants' memorandum in response to plaintiffs' motion to compel, filed Feb. 12*	.50	*Analysis of defendants' supp. responses to plaintiffs' first interrogatories and defendants' memorandum in response to plaintiffs' motion to compel, filed Feb. 12*	.50
35. *Analysis of plaintiffs' response to defendants motion to compel answers and plaintiffs' supp. interrogatories to defendants, received Feb. 27*	1	*Analysis of plaintiffs' response to defendants motion to compel answers and plaintiffs' supp. interrogatories to defendants, received Feb. 27*	1
36. *Analysis of plaintiffs' motion for reconsideration and memorandum*	.25	*Analysis of plaintiffs' motion for reconsideration and memorandum*	.25
37. *Intervenors' notice of deposition, filed Feb. 26*	.50	*Intervenors' motion [sic] of deposition, filed Feb. 26*	.50
38. Deposition of Herbert Boler, March 1	3.8	None	

* Italicized entries indicate those in which identical times are billed.

PARKER ENTRY	TIME	WINFIELD ENTRY	TIME
39. Deposition of Frank Summers, March 2	4.7	None	
40. Analysis of defendants' responses to plaintiffs' supplemental interrogatories, received March 16	.50	None	
41. Preparation of intervenors' first request for admission of facts and genuineness of documents, filed March 20	40	Preparation of intervenors' first request for admission of facts and genuineness of documents, filed March 20	6
42. *Analysis of defendants' response to intervenors' first request for admissions*	1	*Analysis of defendants' response to intervenors' first request for admissions*	1
43. Discussions with counsel re: joint motion to alter briefing schedule	1	None	
44. None		Deposition of Charles Chiplin, May 21	4.5
45. *Deposition of John Ferguson and Robert Walker, May 22*	5.5	*Deposition of John Ferguson and Robert Walker, May 22*	5.5
46. Deposition of Melvin Redmond and discussions with Redmond and counsel	2	None	
47. *Deposition of Henry J. Kirksey, May 24*	4.8	*Deposition of Henry J. Kirksey, May 24*	4.8
48. Depositions of Hoyt T. Holland and Dr. Linda Malone, May 31 (including preparation)	14	Depositions of Hoyt T. Holland and Dr. Linda Malone, May 31 (including preparation)	6
49. Analysis of plaintiffs' amended response to intervenors' request for admissions	.25	None	
50. Preparation of intervenors' pretrial brief, served June 15	30	None	
51. Analysis of Trial Brief of the United States, received June 19	4	None	
52. Analysis of Plaintiffs' Pre-Trial Brief, received June 21	3	None	
53. Preparation of Reply Brief for Intervenors	15	None	

* Italicized entries indicate those in which identical times are billed.

PARKER ENTRY	TIME	WINFIELD ENTRY	TIME
54. *Analysis of United States' Response to Plaintiffs' Pre-Trial Brief and Defendants' Pre-Trial Statement, received June 25*	2	*Analysis of United States' Response to Plaintiffs' Pre-Trial Brief, and Defendants' Pre-Trial Statement, received June 25*	2
55. *Analysis of Defendants' Supp. Response to Intervenors' Request for Admissions, dated June 21*	.25	*Analysis of Defendants' Supp. Response to Intervenors' Request for Admissions, dated June 21*	2.5 [1]
56. *Analysis of plaintiffs' objection and memorandum in support of objection, received June 25*	.25	*Analysis of plaintiffs' objection and memorandum in support of objection, received June 25*	.25
57. *Analysis of Plaintiffs' Reply Brief and attached exhibits, received June 25*	3	*Analysis of Plaintiffs' Reply Brief and attached exhibits, received June 25*	3
58. *Preparation for and pre-trial conference, June 25*	6	*Preparation for and pre-trial conference, June 25*	6
59. Analysis of defendants' proposed findings of fact and conclusions of law, received July 3	3	Analysis of defendants' proposed findings of fact and conclusions of law, received July 3	2
60. *Analysis of plaintiffs' proposed findings of fact and conclusions of law*	.75	*Analysis of plaintiffs' proposed findings of fact and conclusions of law*	.75
61. *Analysis of plaintiffs' informational memorandum and attachments, received July 26*	.75	*Analysis of plaintiffs' informational memorandum and attachments, received July 26*	.75
62. Preparation for oral argument and oral argument on record, July 3	15	None	
63. *Analysis of District Court's findings of fact and conclusions of law, filed July 31*	2	*Analysis of District Court's findings of fact and conclusions of law, filed July 31*	2
64. *Analysis of plaintiffs' motion for early decision, received August 3*	.25	*Analysis of plaintiffs' motion for early decision, received August 3*	2.5 [2]
65. Preparation of intervenors' motion for clarification and for declaratory and injunctive relief, exhibits to motion, and memorandum in support of motion, filed August 14	20	Preparation of intervenors' motion for clarification and for injunctive relief, exhibits to motion, and memorandum in support of motion, filed August 14	10

* Italicized entries indicate those in which identical times are billed.

[1] Petitioners' assume the difference is the result of a misplaced decimal point.

[2] See note 1, *supra*.

PARKER ENTRY	TIME	WINFIELD ENTRY	TIME
66. *Analysis of plaintiffs' memorandum in response and attachments, received August 23*	1	*Analysis of plaintiffs' memorandum in response and attachments, received August 23*	1
67. *Analysis of defendants' memorandum in response, received August 27*	.25	*Analysis of defendants' memorandum in response, received August 27*	.25
68. Analysis of plaintiff's Jurisdictional Statement in U.S. Supreme Court, received October 6, 1979	6	Analysis of plaintiff's Jurisdictional Statement in U.S. Supreme Court, received October 6, 1979	4
69. Analysis of appellants' motion for expedited consideration	.25	None	
70. Preparation of Motion to Affirm of Private Appellees, Eddie Thomas, Sr., et al in U.S. Supreme Court, filed November 26	20	Preparation of Motion to Affirm of Private Appellees, Eddie Thomas, Sr., et al. in U.S. Supreme Court, filed November 26	8
71. *Analysis of Motion of the United States to Affirm in U.S. Supreme Court, received Dec. 3*	4	*Analysis of Motion of the United States to Affirm in U.S. Supreme Court, received Dec. 3*	4
72. *Analysis of appellants' Brief Opposing Motions to Affirm in U.S. Supreme Court, received Dec. 31*	1	*Analysis of appellants' Brief Opposing Motions to Affirm in U.S. Supreme Court, received Dec. 31*	1
73. Preparation of this Affidavit	8	None	
74.		Meeting with clients, June 1978-Feb. 1980	20
TOTAL	381.05	TOTAL	191.35

* Italicized entries indicate those in which identical times are billed.

No. 82-915

In the Supreme Court of the United States

OCTOBER TERM, 1982

CLYDE R. DONNELL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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Washington, D.C. 20530
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TABLE OF AUTHORITIES

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, members of the Board of Supervisors of Warren County, Mississippi, seek review of a decision in which the United States Court of Appeals for the District of Columbia Circuit remanded for reconsideration by the district court a claim for attorney's fees. The claim was asserted against petitioners by nongovernment respondents in petitioners' unsuccessful suit for declaratory relief under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Because the district court's decision on remand may render moot the claims raised in the petition, review by this Court is not warranted.

1. Petitioners brought suit in 1978 under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, seeking a declaratory judgment that their proposed redistricting plan for election of supervisors for Warren County, Mississippi,

had neither the purpose nor the effect of denying or abridging the right to vote on account of race or color (Pet. App. 2a).[1] The nongovernment respondents, who are minority voters from Warren County, moved to intervene as defendants, and a three-judge district court granted the motion (*ibid.*). In July 1979, the three-judge district court entered judgment against petitioners on the ground that they had failed to show a legitimate nonracial justification for a redistricting plan that diminished black voting strength (*ibid.*). This Court summarily affirmed. *Donnell* v. *United States*, 444 U.S. 1059 (1980).

2. In May 1980, the nongovernment respondents moved for an award of attorney's fees, on the ground that they were "prevailing part[ies]" within the meaning of the Voting Rights Act of 1965, 42 U.S.C. 1973*l*(e) (Pet. App. 3a).[2] In early 1981, the district court awarded attorney's fees in the amount of $73,699.88 for work performed by counsel for nongovernment respondents (*id.* at 4a).[3] Petitioners appealed, challenging both the nongovernment respondents' entitlement to any award at all and the reasonableness

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[1]Litigation over an earlier redistricting plan for Warren County led to this Court's decision in *United States* v. *Board of Supervisors*, 429 U.S. 642 (1977).

[2]42 U.S.C. 1973*l*(e) provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The United States did not participate in this aspect of the case in either the district court or the court of appeals.

[3]The original order granting attorney's fees was issued on February 19, 1981, and was amended on March 20, 1981. See Pet. App. 28a-33a.

of the amount awarded (*ibid.*). The nongovernment respondents cross-appealed, contesting the district court's approach to determination of hourly rates (*ibid.*).[4]

3. In June 1982, the court of appeals reversed and remanded the case (Pet. App. 1a-27a). The court of appeals concluded that the district court must resolve the basic question whether the contribution of the nongovernment respondents to the successful outcome of the lawsuit was sufficient to justify any fee award at all (*id.* at 12a-13a). The court of appeals ruled (*id.* at 12a):

> Where Congress has charged a governmental entity to enforce a statutory provision, and the entity successfully does so, an intervenor should be awarded attorneys' fees only if it contributed substantially to the success of the litigation.

Because the district court had failed to determine the significance, if any, of the efforts of the nongovernment respondents, the court of appeals remanded for further proceedings (*id.* at 13a). The court of appeals also addressed various arguments by the parties concerning how the amount of the fees should be calculated (*id.* at 13a-17a), but noted that "if the district court on remand finds that intervenors are not entitled to any fees, the discussion [of the manner of computing the fee] will become moot" (*id.* at 13a).

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[4]The claim of nongovernment respondents for attorney's fees was decided by a single district judge (see Pet. App. 32a, 33a), and petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit, notwithstanding the provision of 42 U.S.C. 1973c that actions for declaratory judgments under Section 5 of the Voting Rights Act of 1965 shall be heard by a three-judge court and any appeal therefrom shall lie to this Court. Neither the parties nor the courts below discussed the propriety of the disposition of the claim for attorney's fees by a single judge and appeal to the court of appeals. That issue is not raised in any of the questions presented in the petition.

4. In this Court petitioners raise a variety of issues, including the proper standard for determining when intervenors may be prevailing parties (Pet. 7-12), the proper method for determining the prevailing hourly rate (*id.* at 12-16), and the scope of the district court's responsibility in resolving contested fee requests (*id.* at 17-20). In view of the interlocutory nature of the court of appeals' decision, none of the issues raised by petitioners is ripe for review. There has been no opportunity for the district court to apply the standards set out by the court of appeals, and the factual record is inadequate. Thus, petitioners present only a series of abstract questions at this stage.

Moreover, if petitioners prevail on remand, there will be no need for them to seek review of the questions they raise in their petition. On the other hand, if they are unsuccessful on remand, they may raise whatever challenges are appropriate, including some or all of those raised in this petition, on a more developed factual record. Petitioners have suggested no considerations that should prevent this Court from adhering to its usual practice of declining to review nonfinal orders of courts of appeals. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville R.L.*, 148 U.S. 372, 384 (1893).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1983

DOJ-1983-01

No. 82-915

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CLYDE R. DONNELL, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,

and

EDDIE THOMAS, SR., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION ON BEHALF OF EDDIE THOMAS, SR., ET AL.

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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BRIEF IN OPPOSITION ON BEHALF OF EDDIE THOMAS, SR., ET AL.

Respondents, Eddie Thomas, Sr., et al., respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision of the Court of Appeals for the District of Columbia Circuit in this case. That opinion is reported at 682 F.2d 240.

STATEMENT

The members of the Warren County, Mississippi, Board of Supervisors instituted this action in the District Court for the District of Columbia seeking preclearance, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, of their 1978 county redistrict-

ing plan. This plan was adopted after the Attorney General objected to the Board's 1970 plan for racial gerrymandering, the Board ignored the Attorney General's objection and held elections under that plan, and the Justice Department was forced to file suit to enforce its objection and enjoin implementation of the 1970 plan. See *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977).

The District Court for the District of Columbia permitted seven black Warren County voters—respondents here—to intervene in this action to protect their rights to a nondiscriminatory county redistricting plan, and extensive evidence in this case, including trial depositions, interrogatories, and requests for admission, was developed by intervenors. After approximately a year and a half of almost continuous discovery and taking of evidence, which included 36 depositions (most of them taken by the Board) and the accumulation of a record of more than 2,500 pages, the case was submitted to the three-judge District Court on the record already developed, oral argument, and briefs. On July 31, 1979, the District Court found that the Board had gerrymandered black voting strength in Warren County by unnecessarily splitting up black population concentrations among four of the five irregularly-shaped districts, had reduced existing levels of black voting strength, and had deprived black citizens, who constituted approximately 40% of the county's population, of the opportunity to elect candidates of their choice in any of the five districts. Finding that the Board had failed to prove that the new plan was not racially discriminatory in purpose or effect, the District Court denied approval of the new plan. This Court summarily affirmed. *Donnell* v. *United States and Eddie Thomas, Sr.*, Civil No. 78-0392 (D.D.C. July 31, 1979), *aff'd mem.*, 444 U.S. 1059 (1980).

Intervenors then moved the District Court for an attorneys' fees award of $89,109.38, and in support of the mo-

tion submitted extensive affidavits setting forth detailed records of the time logged and services rendered (Pet., Appendix B, p. 31a), and the customary hourly rates charged for similar work by District of Columbia attorneys showing the reasonableness of the fee request. Also submitted were copies of billings by the three attorneys for the Warren County Board of Supervisors showing that the number of billable hours charged by the Board's attorneys to the county was almost twice the number of hours claimed by the intervenors' attorneys.[1] The Board never raised any specific objection to the number of hours claimed by three of intervenors' attorneys, Frank R. Parker, Barbara Y. Phillips (for preparing the fees motion), and Richard Kohn, but instead concentrated their objections on the hours claimed by James Winfield, a black Vicksburg attorney, and allegations of duplication of work with Justice Department attorneys, who represented the named defendants (see 682 F.2d at 249-50). The District Court reduced the number of hours for Mr. Winfield in two instances in which the Board questioned his presence at depositions, reduced the hourly rates requested for the attorneys living in Mississippi to accord with Mississippi hourly rates, and awarded a total of $73,669.88, more than $15,000 less than the amount requested.

The Court of Appeals (per Wilkey, J.) reversed and remanded, holding: that the District Court must hold an evidentiary hearing, determine whether intervenors made a "substantial contribution" to the litigation (682 F.2d at 247-48), and scrutinize the number of hours worked by Mr. Winfield (*Id.* at 250-51); that counsel for intervenors (except Mr. Winfield, whose expertise was in Warren County) were entitled to the customary hourly rates in the jurisdiction in which the action was filed and heard (*id.* at 251-53); and that the District

[1] County records showed that the attorneys for the Board billed Warren County for 1,136.8 hours of work (R. 145), while attorneys for the intervenors requested fees for only 649.4 hours of work.

Court must reexamine its basis for adjustments to the lodestar amount (hours times hourly rate) (*id.* at 253-55). Since, at the Board's request, the District Court has stayed further proceedings pending disposition of the petition for certiorari, no further evidentiary hearing or other action by the District Court has been taken.

REASONS WHY THE WRIT SHOULD BE DENIED

Summary

The decision of the Court of Appeals is not a final decision in this case, but remands the case back to the District Court to reassess intervenors' "general entitlement to attorneys' fees in the case" (*id.* at 255), and, if fees are appropriately granted, to conduct an evidentiary hearing to determine the amount. The Court of Appeals' decision therefore is interlocutory only, and review by certiorari at this stage would violate this Court's general policy against piecemeal, interlocutory review of nonfinal judgments. Absent a final determination by the District Court on intervenors' entitlement to fees in this case, the questions of the proper legal standards to be applied for determining the "prevailing party" and the "special circumstances" which would render an award unjust are not yet ripe for determination by this Court.

Contrary to petitioner's contentions, there is no conflict between the lower court decision and the decisions of other Circuits or within the Circuit, and no important question of Federal law is presented, on the legal issues of whether duplicative hours should be compensated or the proper determination of the hourly rate for out-of-town attorneys. The decision below is consistent with other Circuits and other decisions within the Circuit on these issues. Petitioners concede that there is no conflict among the Circuits on the issues of the hourly rate for public interest lawyers and whether an evidentiary hearing should be held and, on the facts of this case, these issues fail to present an important question of Federal law which this Court should resolve in this case.

I. THE PETITION SHOULD BE DENIED BECAUSE THE JUDGMENT BELOW IS INTERLOCUTORY AND NOT FINAL.

Petitioners' request for review of the Court of Appeals' decision violates the general policy of this Court of refusing to review nonfinal judgments, such as one remanding the case back to the District Court for a new trial. *Washington* v. *Fishing Vessel Association*, 443 U.S. 658, 688 n.30 (1979) (issue upon which the District Court has not yet reached a final decision not fairly subsumed within certiorari); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (lack of final District Court judgment on remand "of itself alone furnished sufficient ground for the denial" of certiorari). See R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 300 (5th ed. 1978). Because there is no final order from the District Court in this case, and because the Court of Appeals' mandate directs the District Court to make further determinations and to hold a further evidentiary hearing on certain factual issues, the judgment below is interlocutory only, and certiorari should be denied. The legal issues raised by petitioners will be preserved for review after final District Court action on remand. Indeed, some of the issues presented by petitioners may be eliminated from the case, depending upon the action of the District Court on remand.

II. THE STANDARD FOR DETERMINING A PREVAILING PARTY AND THE ISSUE OF WHICH "SPECIAL CIRCUMSTANCES" WOULD RENDER AN AWARD TO INTERVENORS UNJUST SHOULD NOT BE REVIEWED BY THIS COURT PRIOR TO A FINAL JUDGMENT BY THE DISTRICT COURT UPON REMAND.

A prevailing party should ordinarily recover attorneys fees unless "special circumstances" would render such an

award unjust. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); S. Rep. No. 295, 94th Cong., 1st Sess. 40 (1975) (legislative history of 42 U.S.C. § 1937*l*(e)). The Court of Appeals in this case treated the intervenors as prevailing parties, Pet., Appendix A at pp. 6a-7a, but held that special circumstances would render an attorneys' fees award unjust unless the intervenors "contributed substantially to the success of the litigation." *Id.* at p. 12a.

Petitioners mistakenly refer to this "substantial contribution" test as a holding on the prevailing party issue (Pet. at pp. 8-9), when it actually deals with the "special circumstances" exception. Pet., Appendix A at pp. 10a-12a. Similarly, those portions of the cases which petitioners cite as being in conflict with the Court of Appeals below on the prevailing party issue (*id.* at pp. 7-10) deal with matters other than who is the prevailing party, and in no way contradict the Court of Appeals below on the prevailing party issue.[2]

To the extent that the problem revolves around the "special circumstances" exception, respondents believe that the "substantial contribution" test articulated below is much too strict for intervenors in such cases to have to meet, is not in keeping with the congressional purpose and legislative history of 42 U.S.C. § 1973*l*(e) and 42 U.S.C. § 1988,[3] and is in conflict with the Ninth Cir-

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[2] The portions of *Seattle School Dist. No. 1* v. *Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd on other grounds*, 102 S.Ct. 3187 (1982), cited by petitioners, referred to the special circumstances question, 633 F.2d at 1348, as did those from *Commissioners Court of Medina County* v. *United States*, 683 F.2d 435, 442-443 (D.C. Cir. 1982). In *E.E.O.C.* v. *Strasburger, Price, Kelton, Martin & Unis*, 626 F.2d 1272 (5th Cir. 1980) and *Lipscomb* v. *Wise*, 643 F.2d 319 (5th Cir. 1981), the intervenors had been declared prevailing parties, and the only questions addressed by the Courts were what amount of fees should be awarded and which particular attorneys for the intervenors should receive awards.

[3] *See* S. Rep. No. 295, 94th Cong., 1st Sess. 40 n. 42 (1975) (42 U.S.C. § 1973*l*(e)); S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) (42 U.S.C. § 1988).

cuit's decision in *Seattle School District*.[4] However, review by this Court is unnecessary at this time because respondents will probably demonstrate upon remand to the District Court that they have, in fact, made a substantial contribution to the instant litigation, and will recover the fees to which they are entitled. If that happens, review on this issue will no longer be of immediate practical importance to the respondents, and any appeal by the petitioners will address only the factual question of whether respondents met the "substantial contribution" standard. And if the District Court finds that respondents do not meet the substantial contribution test, the propriety of this test as a matter of law can be pursued through appeal and a petition for certiorari, with the aid of a District Court ruling illustrating the practical application of the test.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS OR WITHIN THE DISTRICT OF COLUMBIA CIRCUIT ON THE LEGAL ISSUE OF WHETHER DUPLICATIVE HOURS SHOULD BE COMPENSATED.

In Section III of the Petition, petitioners state that the Court of Appeals below held that once fees are awardable, all hours requested by counsel—whether duplicative or not—should be compensated. (Petition at p. 10).[5] This interpretation of the Court's holding is ridiculous. In actuality, the Court ruled in conformity with the other Court of Appeals decisions cited by the

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[4] In *Seattle*, fees were denied the intervenors for their "*de minimis*" role in the resolution of the issue upon which the ultimate result rested, but were awarded for work on another issue which was never resolved. That would appear to conflict with the Court of Appeals' decision here, since work on an unresolved issue would not seem to have "contributed substantially to the success of the litigation." Appendix A at 12a.

[5] The title of Section II of the petition appears to cover the Courts of Appeals' treatment of the entire "special circumstances" issue, but the substance deals only with the matter of duplicative hours.

petitioner that unnecessarily duplicative hours are not compensable, even though there is some award made. Thus, there is no conflict among the Courts to be resolved on this issue.

After devoting a whole section of its opinion to the issue of "entitlement to fees," the Court of Appeals below wrote a subsequent and entirely separate section on "calculations of the fees." If petitioners' interpretation were correct, there would have been no need for this second section inasmuch as all requested hours would be compensated once overall entitlement were shown. Contrary to petitioners' statement, the Court said that even if entitlement were shown in this instance because "intervenors' participation in the case was important and substantial," the question remained of whether all of the claimed hours were justified "given the central role played by four attorneys from the Department of Justice." Pet., Appendix A at 16a. Moreover, the Court of Appeals, while affirming the District Court's factual determination that the claimed hours of two of intervenors' attorneys were reasonable, remanded for an evidentiary hearing as to the time charged by Mr. Winfield, specifically instructing the District Court to review petitioners' objections about allegedly duplicative time entries on the part of Mr. Winfield.

Clearly, the Court of Appeals below held that unnecessarily duplicative hours should not be compensated. This coincides with the rulings of other Courts of Appeals on this issue. Petitioners' only complaint, then, would revolve around that portion of the Court of Appeals' ruling affirming the District Court's finding that all hours claimed by two of the three attorneys for the intervenors were reasonable. That is a pure question of fact, committed to the District Court's discretion, and not appropriate for review on a writ of certiorari.[6]

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[6] Contrary to petitioners' contentions, (Pet., pp. 11-12), for its factual determination that the number of hours claimed by inter-

IV. THERE IS NO CONFLICT IN CIRCUITS AS TO A PROPER DETERMINATION OF THE HOURLY RATE FOR OUT-OF-TOWN ATTORNEYS.

The Court of Appeals below held that out-of-town counsel, with some exceptions, should be compensated at the going rate for attorneys in the district in which the action is filed and heard, whether that rate be higher or lower than the going rate in the attorney's hometown. Pet., Appendix A at p. 18a. As the Court noted, this "is a neutral rule which will not work to any clear advantage for either those seeking attorneys' fees or those paying them." *Id.* It is totally in harmony with the cases which petitioner erroneously contends are conflicting: *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *petition for cert. pending*, No. 81-2135, and *Avalon Cinema Corp.* v. *Thompson*, 689 F.2d 137 (8th Cir. 1982) (en banc). Both of these cases held that the rate which normally should be applied is that which exists in the area where the District Court hears the case.[7]

Petitioners seek a rule which would always limit out-of-town civil rights attorneys to whichever fee is *lower*.

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venors' attorneys (other than Mr. Winfield) was reasonable (Pet., Appendix B, p. 31a), the District Court had before it, not only affidavits of counsel, but also the entire record in the case, including the performances of counsel at depositions, the separate pleadings, interrogatories, requests for admissions, and the like, filed by counsel for intervenors which were not filed by the Justice Department attorneys, and the separate briefs. This Court long ago observed that a trial judge "has far better means of knowing what is just and reasonable than an appellate court can have." *Trustees* v. *Greenough*, 105 U.S. 527, 537 (1882). Accordingly, because of the trial court's greater familiarity with the record and proceedings before it, its determination of what is reasonable in awarding fees can be reversed on appeal only if it represents an abuse of discretion. See, e.g., *Copeland* v. *Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (en banc).

[7] In both cases, the Court held that higher-priced out-of-town attorneys should be limited to the local rate unless it was necessary to look out-of-town to find attorneys with the requisite expertise and desire to handle the litigation.

This is not the rationale behind *Chrapliwy* or *Avalon Cinema*, and such a rule would contradict the express Congressional purposes of 42 U.S.C. §§ 1973*l*(e) and 1988, which are to encourage vigorous and competent civil rights advocacy.

V. THE ISSUE OF WHETHER PUBLIC INTEREST LAWYERS SHOULD RECEIVE THE SAME HOURLY RATES AS MEMBERS OF THE PRIVATE BAR DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD OCCUPY THIS COURT'S TIME.

Petitioners contend, rather incredibily, that attorneys employed by public interest organizations should receive compensation at lower rates than members of the private bar. Before addressing the lack of merit in this contention, it should be noted that petitioners never raised this argument in the Court of Appeals below. Indeed, their brief to the Court of Appeals said: "There is no disagreement between the parties that . . . although some individuals seeking an award are salaried employees of a public-interest organization, the factor is *irrelevant*, *Copeland* v. *Marshall*, 641 F.2d 880, 899 (D.C. Cir. 1980) (en banc). . . ." (Brief for Appellants at pp. 4-5) (emphasis added). Where the petitioners never allowed the Court of Appeals to review this issue, and where they took the opposite position in the Court of Appeals from that which they presently take, the petition for certiorari should be denied.

Moreover, petitioners' current position clashes directly with this Court's statement that representation by a public interest group is not a "special circumstance" justifying a denial of fees. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 70 n.9 (1980). Surely, if representation by a public interest group does not justify a denial of fees, there is nothing in logic which would dictate that such representation justifies a reduction in the *amount* of fees. *See also*, H.R. Rep. No. 94-1558, 94th Cong., 2d

Sess. 8 n.16 ("[A] prevailing party is entitled to counsel fees even if represented by an organization . . . ."). In fact, petitioners' position runs directly counter to the Congressional purpose of encouraging vigorous and competent representation by civil rights advocates. As noted in the legislative history of 42 U.S.C. § 1988:

> It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976).

Petitioners attempt to mislead this Court into believing that the District of Columbia Circuit provides one method of proving the amount of attorneys' fees for public-interest lawyers, and a distinct and stricter method for members of the private bar. (Petition at pp. 15-16, citing separate passages from *National Ass'n of Concerned Veterans* v. *Secretary of Defense*, 675 F.2d 1319, 1325, 1326 (D.C. Cir. 1982)). This is just not correct. The cited statements from *National Association of Concerned Veterans* prescribe requirements of proof for *all* lawyers, public interest and private, and create no distinctions.

VI. THE NECESSITY OF HOLDING AN EVIDENTIARY HEARING WHEN A FEE REQUEST IS OPPOSED DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW AND NEED NOT BE DECIDED IN THE CONTEXT OF THIS CASE WHERE THE COURT OF APPEALS HAS REMANDED WITH INSTRUCTIONS TO HOLD AN EVIDENTIARY HEARING.

Part VI of the petition is preceded with a heading asking this Court to review "the issue of the exact scope of responsibility of a district judge when a fee request is opposed." That issue need not be decided since it is clear what the District Judge's responsibility is: to determine

whether attorney's fees should be awarded and how much. As the text of Section VI of the petition indicates, what petitioners really seek is review of the question of when an evidentiary hearing should be held.

This case is particularly inappropriate for such review inasmuch as the Court of Appeals has remanded this action to the District Court with specific instructions to hold an evidentiary hearing regarding the reasonableness of the hours claimed by one of the three lawyers for the intervenors. The question of whether an evidentiary hearing should be held when attorneys' fees applications are opposed is not relevant to this case—a hearing *is* going to be held upon remand.

Petitioners' real complaint is that the hearing is only going to cover the reasonableness of the hours of Attorney Winfield and not Attorney Parker. However, the only specified objection to Parker's hours raised by petitioners is that they are duplicative of hours claimed by Winfield. (Petition at p. 18, n.24). If this objection is valid, it can be cured by striking the hours claimed by Winfield for work that was done by Parker alone. The Court of Appeals specifically affirmed the District Court's finding that Parker's claimed hours are reasonable, noting that petitioners failed to specify their challenge to Parker's hours. By holding, upon remand, a hearing which covers Winfield's hours and not Parker's, the District Court will be doing what all trial courts do—limiting the evidence to issues where there is a reasonable dispute of fact. Complaints about such a limitation are not the stuff of writs of certiorari.

Even outside the context of this case, there is little need for this Court to address the issue of whether and when an evidentiary hearing should be held on motions for attorneys' fees. Some disputes over fees can be resolved by the District Court by a simple review of the record and the affidavits; others may require full-blown evidentiary hearings; still others can be taken care of by

some procedure that falls in between these two poles. It is a matter best determined by the District Court in the particular instance. The wide variety of disputes over attorneys' fees would not be efficiently handled by a set rule emanating from this Court which would limit the discretion of the District Courts as to when hearings are necessary and when they are not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 82-915

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CLYDE R. DONNELL, HERBERT BOLER, THOMAS F. AKERS, PAUL A. PRIDE, JAMES R. ANDREWS, Members of the Board of Supervisors of the County of Warren, Mississippi, Acting for and on behalf of the County of Warren, *Petitioners*

v.

UNITED STATES OF AMERICA

and

EDDIE THOMAS, SR., CHARLIE STEELE, FRANK H. SUMMERS, ST. CLAIR MITCHELL, MRS. CHARLIE HUNT, TOMMIE LEE WILLIAMS, SR., WILLIE JORDAN, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF

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REPLY BRIEF

The fact that the petition raises important federal questions,[1] some of which present a conflict in circuits,[2]

[1] For instance, the number of hours which, on their face, overlap similar legal work performed by attorneys representing the United States presents an issue almost identical with that now under consideration in Hensley v. Eckerhart, No. 81-1244, *i.e.*, compensation for time spent on work unrelated or unnecessary to the ultimate decision on the merits.

[2] See, *e.g.*, Brief in Opposition on Behalf of Eddie Thomas, et al. pp. 6-7 (agreeing that "substantial contribution" test used by the court below conflicts with approach taken by Ninth Circuit and arguing that the former is "too strict").

is not seriously disputed. While the remand order by the lower court is alluded to by respondents as a reason to deny review, any one of the significant rulings made by the court below fits well within precedent by this Court that decisions on important and clear-cut issues of law that would otherwise qualify for certiorari will be reviewed if they are important to the further conduct of the case. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964). See generally, R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 301 (5th ed. 1978). A grant of certiorari is therefore proper.

Respectfully submitted,

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